Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, (formerly Fidelity and Columbia Trust Company), JOINT ADMINISTRATORS with the Will Annexed OF THE ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit

Office Supreme Court, U.S.
FILED
MAY 10 1965
JOHN F. DAVIS, CLERK

WALTER B. SMITH
800 Columbia Building
Fourth and Main Streets
Louisville, Kentucky
Counsel for Petitioner

May 10, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

STATEMENT OF FACTS IN SUPPORT OF PETITION FOR REHEARING 1-39

JURISDICTION OF THIS COURT 3

DENIAL OF DUE PROCESS OF LAW—Petitioner is being required to pay $73,756.98 fees without a trial of this case, without her day in Court, and without any Jurisdictional Determination as to the merits of these claims against her 3-12

Section 429 of Civil Code of Practice of Kentucky 5

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank and Trust Co.*, 262 S.W. 2d 479, (Nov. 20, 1953) 6

Scott's Heirs v. *Kennedy's Ex'r*, 12 B. Mon. 510-515 6-7

Turley's Adm'r v. *Barnes* 103 Ky. 127; 44 S.W. 446; XIX K.L.R. 1808 6-7

KRS 25.200 9

KRS 413.120(12) (KS 2515; 2518) 9

Griffith v. *Bank of New York*, 147 F. 2d 899 (1945) 10

Paul et al. v. *Girard Trust Co.*, 124 F. 2d 809 (1941) 10

Rogers v. *Girard Trust Co.*, 159 F. 2d 239 (1947) 10

W. J. Mered'h et al. v. *City of Winter Haven*, 320 U.S. 228 (1943) 10

Rule 19 of the Rules of the Supreme Court of the United States 11

SYNOPSIS OF CASE 3-4

The District Court Denied Mrs. Smith the Right of a Trial to Prove That the Two Trust Companies Owe Her More Than $84,631.95 Interest on Cash of $40,000.00 Now Held By Them, Belonging to Her 11

KRS 395.310 11

Page

The Joint Administrators and Their Attorneys Are Not Legally Entitled to Any Fees or Any Interest on the Fees Claimed 12

Beeler and Others, Heirs of Hill v. *Hill's Executor and Other Heirs*, (1837) 5 Dana (35) 37, 147 Ky. 323; 144 S.W. 20 12

Smith v. *The Louisville Trust Company and Citizens Fidelity Bank and Trust Company*, 308 Ky. 189; 213 S.W. (2d) 987 (June 8, 1948) Rehearing denied Oct. 29, 1948 14

The Louisville Trust Company and Citizens Fidelity Bank and Trust Company v. *Smith*, 313 Ky. 15; 230 S.W. (2d) 64 (May 16, 1950).. 14

Smith v. *The Louisville Trust Company and Citizens Fidelity Bank and Trust Company*, 237 S.W. (2d) 836 (March 6, 1951) Rehearing denied April 17, 1951; (in which Mrs. Smith was granted a permanent injunction against the Joint Administrators enjoining them from prosecuting their Second Trumped-up Settlement Suit of the O'Brien Estate) 14

Smith v. *The Louisville Trust Company and Citizens Fidelity Bank and Trust Company*, 262 S.W. 2d 479, (November 20, 1953) 14

Section 428 of Civil Code of Practice of Kentucky 15

Section 429 of Civil Code of Practice of Kentucky 15

4. Nature of Suit—This Suit is definitely the Third Settlement Suit filed by the Respondent Joint Administrators to settle the Estate of John A. O'Brien and is not a statutory "over-distribution" Suit under KRS 396.140 16-18

Section 429 of Civil Code of Practice of Kentucky 15

KRS 25.175 16

Page

5. Petitioner Mrs. Smith, did not have any controversies with the O'Brien Family; Petitioner did not make any compromise of any controversies, with the O'Brien Family 18-20

6. The Ruling by the Court of Appeals for the Sixth Circuit and by the District Court (Judge Kent) in the Within Case, That the Claims of Fraud Against the Joint Administrators Set Forth in Mrs. Smith's Original Counterclaim, Are Barred by the Rule of Res Judicata, is in Conflict With the Decision of the District Court (Judge E. B. Freed), on the Same Issue, and Against the Same Two Trust Companies, the Respondents Herein 20-27

O'Brien v. *O'Brien*, 294 Ky. 793; Cert. Den. 321 U.S. 767; reh. den. 322 U.S. 769 21

ORDER of Judge E. B. Freed, Overruling the Joint Administrators' Motion for a Summary Judgment on the Same Issue of Fraud as in the Within Case and Against the Same Two Trust Companies 21-22

Rule 56 of the Rules of Civil Procedure 22

MEMORANDUM OPINION RE Motion for Summary Judgment by Judge E. B. Freed, United States District Judge, Overruling the Joint Administrators' Motion for Summary Judgment on the Same Issue of Fraud as in the Within Case and Against the Same Two Trust Companies 22-24

O'Brien v. *O'Brien*, 294 Ky. 793; 172 S.W. 2d 595 (Cert. Den. 321 U.S. 767; reh. den. 322 U.S. 769) 23

Oklahoma Packing Co. v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4 23

In re Potts, 6 Cir., 142 F. (2d) 883 23

Waybright v. *Columbian Mutual Life Insurance Co.*, 6 Cir., 122 F. (2d) 245 23

Swift Coal and Timer Co. v. *Cornett*, 249 Ky. 760 23

Page

Ralph Wolff & Sons v. *New Zealand Insurance Co.*, 248 Ky. 304 23

Prewitt v. *Wilborn*, 184 Ky. 638; 212 S.W. 442 .. 23

(1) The Case of *O'Brien* v. *O'Brien*, 294 Ky. 793; Cert. Den. 321 U.S. 767; reh. den. 322 U.S. 769, the Rescission Suit Was Not Adequately Before the Supreme Court for a Consideration of a Decision, and Mrs. Smith's Original Counterclaim Is Not Barred by the Rule of Res Judicata 24-27

7. Respondent Joint Administrators' Partial Settlement of Their Accounts of Mr. O'Brien's Estate, in Jefferson County Court, Was Not a Final Settlement of the Estate and Three of the Reasons Are Set Out in the Opinion of the Court of Appeals of Kentucky, and Mrs. Smith Did Not Contest, Object To, or Try to Prevent the Two Trust Companies From Filing a Final Settlement of the O'Brien Estate in Jefferson County Court 27-36

Smith v. *Shamburger*, 314 Ky. 830; 238 S.W. 2d 844 (January 26, 1951) 28-29

Smith v. *The Louisville Trust Company and Citizens Fidelity Bank and Trust Company*, 262 S.W. 2d 479, (November 20, 1953) 29

A County Court Judge (in Kentucky) Has No Jurisdiction to Enter a Judgment or Amend a Judgment for a Recovery of Money Against Patricia O'Brien Smith or Anyone 30-36

(1) The Jefferson County Court did not, and could not legally make a "final settlement" of Respondents' accounts as Co-administrators, and "could not legally adjudge the estate to be finally settled", as long as the Joint administrators retained $30,788.86 plus interest compounded at the rate of 6% for 29 years which they have illegally withheld (in violation of Kentucky Statutes) belonging to the O'Brien Estate of which Mrs. Smith is the sole beneficiary 27

(2) Mrs. Smith was not present, and she was not represented by her counsel, at any of the hearings and proceedings, in the Jefferson County Court, when the two Trust Companies and their attorneys

Page

were awarded $73,756.98 additional attorneys' fees, and fees for the two Trust Companies, in violation of their written contracts and agreements, and they were not entitled to any fees, because they did not render any services to the O'Brien Estate 28-30

(3) The Joint Administrators did not file in the within case, any copy of any "Transcript of Testimony with Report and Supplementary Report of Commissioner, and the Order confirming the Commissioner's Reports, taken in Re: Estate of John A. O'Brien, Deceased, No. 24146, taken in Jefferson County Court Probate Division, from July 1951, through January 1952, wherein the Joint Administrators filed over 82 Exhibits, during the uncalled for and unnecessary expensive hearings and proceedings, at which neither Mrs. Smith or her counsel were present, which when printed consisted of 233 printed pages", it was not filed in the within case in any Court and if it was submitted with the Petition for Writ of Certiorari to this Court, it should not be considered by this Court, and if it is now with the Record of the within case, in the Supreme Court, it should be expunged from the Records in the within case in this Court 29

(4) The Petitioner Mrs. Smith could not legally appeal from the Jefferson County Court "purported final settlement", because the County Court could not enter an in personam judgment, upon which the Joint administrators could levy an execution, and because Mrs. Smith did not file any exceptions to the purported final settlement of the Joint Administrators' accounts of the O'Brien Estate in the Jefferson County Court 30

Scott's Heirs v. *Kennedy's Ex'r.*, 12 B. Mon. 510-517 (Petitioner's Appendix "A" to her Petition For Writ of Certiorari, pages 36-44) 32-33

Stanberry's Adm'r v. *Robinson*, 16 Ky. Law Rep. 309-312 (also Appendix "A", pp. 52-57) 33

Turley's Adm'r v. *Barnes*, 103 Ky. 127; 44 S.W. 446; XIX KLR 1808 33

Page

KS 1067 now KRS 25.190 and KRS 25.200 35

Smith v. *The Louisville Trust Co., and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479, (November 20, 1953) 35

8. The Petitioner's Counterclaim, First Amended Counterclaim, and Second Amended Counterclaim 36-39

(a) Are Not Barred by Kentucky's *limitations* statutes (see Petitioner's Petition for Writ of Certiorari, pp. 187-198) and cases cited which are: 38-39

KRS 413.090 38

U.S. Fidelity and Guaranty Co. v. *Shields*, 157 Ky. 371; 163 S.W. 203 38

KRS 62.060 38

KRS 25.175 38

KRS 62.070 38

KRS 287.220 38

44 ALR (2d) pp. 808, 809 38

Hargis v. *Sewell's Admr.*, 87 Ky. 63; 7 S.W. 557; 9 Ky. Law Rep. 920 38

Kitchen's Ex'rs v. *King*, 255 Ky. 235; 73 S.W. 2d 45 38

Anspacher v. *Utterback's Adm'r*, 252 Ky. 666; 68 S.W. 2d 15 38

Blackwell et al v. *Fidelity and Deposit Co.*, 163 Ky. 76; 173 S.W. 321 38

Blake v. *Wolfe*, 105 Ky. 380; 49 S.W. 19; 20 Ky. Law Rep. 1212 38

Wren's Ex'r v. *Wren's Ex'r*, 126 Ky. 704; 104 S.W. 737; 31 Ky. Law Rep. 1096 38

Rison et al v. *Shepherd et al*, (1945) 299 Ky. 693; 186 S.W. (2d) 648 38

Page

Tucker v. *Aetna Casualty & Surety Co.*, 270 Ky. 723; 110 S.W. (2d) 649 38

Schwerman v. *Commonwealth*, 99 Ky. 296; 38 S.W. 146; 18 Ky. Law Rep. 585 38

Grant County Building & Loan & Savings Association v. *Lemmon*, 78 S.W. 874; 25 Ky. Law Rep. 1725 38-39

Commonwealth v. *Sammons*, 180 Ky. 403; 202 S.W. 885 39

(b) Not barred by the rule of res judicata, by Judgment in Petitioner's Rescission Suit which was against only the brothers of John A. O'Brien ..

See pages 20-27 of this Petition for Rehearing and pages 126-138 of the Petition for Writ of Certiorari filed in this Court on January 16, 1965

REASONS FOR GRANTING THE WRIT 39-71

I. The Court Of Appeals For The Sixth Circuit Did Not Follow Or Apply The Kentucky Law Governing The Final Settlement Of Accounts Of Administrators Of An Estate In Kentucky, In The O'Brien Estate 39-47

Section 429 of the Civil Code of Practice of Kentucky 41

Simmons v. *Stern*, C.C.A.-N.M. 9 Fed. 256-259 .. 41

Scott's Heirs v. *Kennedy's Ex'r*, 12 B. Monroe 510-517, 51 Ky. 510-517; 4 KLR 712 (1849) .. 43

Stanberry's Adm'r v. *Robinson*, 16 Ky. Law Rep. 309-312 43

Turley's Adm'r v. *Barnes*, 103 Ky. 127; 44 S.W. 446; XIX KLR 1808 43

Harper v. *Lamb, Ballantine et al.* v. *Harper et al.*, 202 Ky. 771, 261 S.W. 280-282 (Court of Appeals of Ky. April 25, 1924) 43

Frazier v. *Kavanaugh Adm'r*, 4 Ky. Law Rep. 712 43

Page

Article 5, Chapter 35 Kentucky Statutes 43

Smith v. *Shamburger, Judge,* 314 Ky. 850; 238 S.W. 2nd 844, January 26, 1951 44

II. The Court Of Appeals For The Sixth Circuit Did Not Follow Or Apply The Kentucky Statutes Or The Kentucky Revised Statutes Governing The Final Settlement Of Accounts Of Administrators Of An Estate, Or The Administration Of An Estate In Kentucky, In The O'Brien Estate In Which The Joint Administrators Violated More Than Nine (9) Kentucky Statutes 47-54

KS Section 1067 46

KRS 25.200 (1067) 46

KS 3858 now KRS 25.175 47-48

Section 429 of the Civil Code of Practice of Kentucky 47-48

KRS 25.170 (1062; 1065) 1893 c. 221, Sec. 42, 45 48-50

KRS 25.190 (1066; 1067) 1893 c. 221, Sec. 46, 47 50

KRS 25.200 50

KRS 64.260 (396; 401; 407; 408; 1740) 50

KRS 395.255 51-52

KRS 395.310 52

Griffith v. *Bank of New York,* 147 Fed. (2d) 899, (February 16, 1945) 51-52

Rogers v. *Girard Trust Co.,* 159 F. 2d 239, (1947) 52

Meredith v. *City of Winter Haven,* 320 U.S. 228; 64 S. Ct. 7, at page 11, (1943) 52

KRS 446.070 (KS 466) 52-53

Section 429 of the Civil Code of Practice of Ky. 53

KRS 413.090 (2514) 53-54

Page

III. The Rulings Of The District Court, Which Were Upheld By The Court Of Appeals For The Sixth Circuit, Violated Rule 15, Of The Federal Rules Of Civil Procedure In Not Permitting Mrs. Smith To File Any Amendments To Her Original Answer Or Her Original Counterclaim 55-56

Rule 15, Federal Rules of Civil Procedure 55

Mrs. Smith's amendments did not seek to relitigate claims which had been adjudicated in the probate Court final settlement 55

Mrs. Smith's tendered counterclaims were not barred by Kentucky limitations Statutes 55

Mrs. Smith's claims were not barred under the rule of res judicata by the Judgment in her Rescission suit 55

Order and Opinion of Judge E. B. Freed, United States District Judge (also see Writ of Certiorari pp. 126-138; 187-198; 191-198) 55

IV. The Decision Of The Court Of Appeals For The Sixth Circuit, Is In Conflict With The Second Circuit Court Of Appeals, The Seventh Circuit Court Of Appeals, Their Own Sixth Circuit, And With This Court's Ruling 56-60

W. J. Meredith, et al. v. *City of Winter Haven,* 320 U.S. 228-238 (1943) 56

Griffith v. *Bank of New York,* 147 F. 2d 899 (1945) 56-57

Paul, et al. v. *Girard Trust Co.,* 124 F.2d 809 (1941) 57

Rogers v. *Girard Trust Co.,* 159 F. 2d 239 (1947) 57-59

Meredith v. *City of Winter Haven,* 320 U.S. 228-238 (1943) 59-60

Erie R. Co. v. *Tompkins,* 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 ALR 1487 59-60

Wichita Royalty Co. v. *City Nat. Bank,* 306 U.S. 103, 83 L. Ed. 515, 59 S. Ct. 420 60

Page

West v. *American Teleph. & Teleg. Co.*, 311 U.S. 236, 85 L. ed. 143, 144, 61 S. Ct. 179, 132 ALR 956 60

Fidelity Union Trust Co. v. *Field*, 311 U.S. 177-180, 85 L. ed. 112-114, 61 S. Ct. 176 60

Six Co.'s of Cal. v. *Joint Highway Dist.*, 311 U.S. 180, 188, 85 L. ed. 114, 117, 61 S. Ct. 186.. 60

Stoner v. *New York L. Ins. Co.*, 311 U.S. 464, 85 L. ed. 284, 61 S. Ct. 336 60

Palmer v. *Hoffman*, 318 U.S. 109, 116, 118, 87 L. ed. 645, 651, 63 S. Ct. 477, 144 ALR 719 60

V. The Petitioner, Mrs. Smith, Was Denied Due Process Of Law Guaranteed By The Fourteenth Amendment To The Constitution Of The United States, When She Was Denied The Right Of A Trial In This Suit Filed Against Her On September 13, 1956 61-72

There were genuine issues as to material facts; and the material facts were not established by any admissions in the Petitioner's pleadings and there was not any records of any judicial proceedings to which Mrs. Smith was a party, ever filed in the within case either in the District Court or the Court of Appeals, as the copies of the Certified Docket Entries in the three volumes of the Printed Transcript of Record of this case shows 61-66

Nebbia v. *People of State of New York. N. Y.*, 54 S. Ct. 505, 291 U.S. 502, 78 L. Ed. 940, 89 A.L.R. 1469 66

North American Co. v. *Securities and Exchange Commission*, CCA, 133 F. 2d 148, 154 66

KRS 25.175 66

Griffith v. *Bank of New York*, 147 Fed. (2d) 899, February 16, 1945 67

Rogers v. *Girard Trust Co.*, 159 F. 2d 239 (1947) 67

Paul, et al. v. *Girard Trust Co.*, 124 F. 2d 809 (1941) 67

Page

Meredith v. *City of Winter Haven*, 320 U.S. 228-231; 64 S. Ct. 7, at page 11 (1943) 67

Zeigler v. *Railroad Co.*, 58 Ala. 599 68

San Jose Ranch Co. v. *San Jose Land & Water Co.*, 58 P. 824, 825, 126 Cal. 322 68

U.S.C.A. Const. Amend. 14; Mo. St. Ann. Const. Art. 2, Sec. 30 68

Chicago Great Western R. Co. v. *Public Service Commission* (Mo.) 51 S.W. (2d) 73, 77 68

Peerce v. *Kitzmiller*, 19 W. Va. 564, 565 68

White v. *Crump*, 19 W. Va. 583, 595 68

Owens v. *Battenfield* (CCA Okla.) 33 F. (2d) 753, 757 68

Broadway v. *Alabama Dry Dock & Shipbuilding Co.*, 20 So. 2d 41, 50, 246 Ala. 201 68

Brown v. *Levee Com'rs.*, 50 Miss. 468 70

Embury v. *Conner*, 3 N.Y. 511, 53 Am. Dec. 325 70

National Sur. Corp. v. *Sharpe*, 59 S.E. 2d 593, 597, 232 N.C. 98 70

Davidson v. *New Orleans*, 96 U.S. 104, 24 L. Ed. 616 70

State v. *Rossi*, 71 R. I. 284, 43 A. 2d 323, 326 ... 70

Direct Plumbing Supply Co. v. *City of Dayton*, 138 Ohio St. 540, 38 N.E. 2d 70, 72, 137 A.L.R. 1058 70

Stoner v. *Higginson*, 316 Pa. 481, 175 A. 527, 531 70

McKenna v. *McKenna*, 70 Ill. App. 340 70

Ryan's Furniture Exchange v. *McNair*, 162 So. 483, 120 Fla. 109 70

People v. *Skinner*, Cal., 110 P. 2d 41, 45 70

Staley v. *Safe Deposit & Trust Co. of Baltimore*, 56 A. 2d 144, 148, 189 Md. 447 70

Quimby v. *Hazen*, 54 Vt. 132, 139 70

Page

CONCLUSION 71

CERTIFICATE OF COUNSEL 72

APPENDIX "E"—Opinion of District Court 1a-23a

APPENDIX "F"—Petition for Rehearing for Mrs. Smith on Opinion of the District Court 1a-46a

TABLE OF CASES CITED

Anspacher v. *Utterback's Adm'r.*, 252 Ky. 666; 68 S.W. 2d 15 38

Beeler et al. v. *Hills et al.*, 5 DANA (35) 37, 147 Ky. 323, 144 S.W. 20 12

Blackwell et al. v. *Fidelity and Deposit Co.*, 163 Ky. 76; 173 S.W. 321 38

Blake v. *Wolfe*, 105 Ky. 380; 49 S.W. 19; 20 Ky. Law Rep. 1212 38

Broadway v. *Alabama Dry Dock Shipbuilding Co.*, 20 So. 2d 41, 50, 246 Ala. 201 68

Brown v. *Levee Com'rs.*, 50 Miss. 468 70

Chicago Great Western R. Co. v. *Public Service Commission*, (Mo.) 51 S.W. 2d 73, 77 68

Commonwealth v. *Sammons*, 180 Ky. 403; 202 S.W. 885 39

Davidson v. *New Orleans*, 96 U.S. 104, 24 L.Ed. 616 ... 70

Direct Plumbing Supply Co. v. *City of Dayton*, 138 Ohio St. 540, 38 N.E. 2d 70, 72, 137 A.L.R. 1058 ... 70

Embury v. *Conner*, 3 N.Y. 511, 517, 53 Am. Dec. 325 ... 70

Frazier v. *Kavanaugh Adm'r*, 4 Ky. Law Rep., 712 .. 43

Grant County Building & Loan & Savings Association v. *Lemmon*, 78 S.W. 874; 25 Ky. Law Rep. 1725 .38-39

Griffith v. *Bank of New York*, 147 Fed. 2d 899, February 16, 1945 .....10, 51, 52, 56, 67

Hargis v. *Sewell's Admr.*, 87 Ky. 63; 7 S.W. 557; 9 Ky. Law Rep. 920 38

Harper v. *Lamb. Ballantine et al.* v. *Harper et al.*, 202 Ky. 771, 261 S.W. 280-282 (Court of Appeals of Ky. April 25, 1924) 43

Kitchen's Ex'rs. v. *King*, 255 Ky. 235; 73 S.W. 2d 45 38

McKenna v. *McKenna*, 70 Ill. App. 340 70

Page

Meredith v. *City of Winter Haven*, 320 U.S. 228; 64 S.Ct. 7 at page 11, (1943) 10, 11, 52, 56, 59, 60, 67
National Sur. Corp. v. *Sharpe*, 59 S.E. 2d 593, 597, 232 N.C. 98 69
Nebbia v. *People of State of New York, N.Y.*, 54 S.Ct. 505, 291 U.S. 502, 78 L.Ed. 940, 89 ALR 1469 66
North American Co. v. *Securities and Exchange Commission*, CCA, 133 F. 2d 148, 154 66
O'Brien v. *O'Brien*, 294 Ky. 793; Cert. Den. 321 U.S. 767 reh. den. 322 U.S. 769 .....21, 23, 24, 26, 27
Oklahoma Packing Co. v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4 23
Owens v. *Battenfield*, (C.C.A. Okla.) 33 F. (2d) 753, 757 70
Paul et al. v. *Girard Trust Co.*, 124 F. 2d 809, (1941) 10, 57, 67
Peerce v. *Kitzmiller*, 19 W.Va. 564, 565 70
People v. *Skinner*, Cal., 110 P. 2d 41, 45 70
In re Potts, 6 Cir., 142 F (2d) 883 23
Prewitt v. *Wilborn*, 184 Ky. 639 23
Quimby v. *Hazen*, 54 Vt. 132, 139 70
Rison et al. v. *Shepherd et al.*, (1945) 299 Ky. 693; 186 S.W.(2d) 648 38
Rogers v. *Girard Trust Co.*, 159 F. 2d 239, (1947) 10, 11, 52, 57, 67
Ryan's Furniture Exchange v. *McNair*, 162 So. 483, 120 Fla. 109 70
San Jose Ranch Co. v. *San Jose Land & Water Co.*, 58 P. 824, 825, 126 Cal. 322 68
Schwerman v. *Commonwealth*, 99 Ky. 296; 38 S.W. 146; 18 Ky. Law Rep. 585 38
Scott's Heirs v. *Kennedy's Executor*, 12 B.M. 515 51 Ky. 510-517; 4 KLR 712, (1849) 6, 32, 43
Simmons v. *Stern*, C.C.A. N.M. 9 Fed. 256-259 41
Smith v. *Shamburger, Judge*, 314 Ky. 850; 238 S.W. 2d 844, January 26, 1951; Rehearing denied, May 11, 1951 .....28, 29, 44, 45
Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 308 Ky. 189; 213 S.W. (2d) 987 (June 8, 1948) Rehearing denied Oct. 29, 1948 ..14, 49
Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 237 S.W. (2d) 836 (March 6, 1951) Rehearing denied April 17, 1951 14

Page

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479, (November 20, 1953) 6, 14, 29, 35
Staley v. *Safe Deposit & Trust Co. of Baltimore*, 56 A. 2d 144, 148, 189 Md. 447 70
Stanberry's Adm'r v. *Robinson*, 16 Ky. Law Rep. 309 ..... 33, 43
State v. *Rossi*, 71 R.I. 284, 43 A. 2d 323, 326 70
Stoner v. *Higginson*, 316 Pa. 481, 175 A. 527, 531 70
Swift Coal and Timer Co. v. *Cornett*, 249 Ky. 760 .. 23
The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co. v. *Smith*, 313 Ky. 15; 230 S.W. (2d) 64 (May 16, 1950) 14
Tucker v. *Aetna Casualty & Surety Co.*, 270 Ky. 723; 110 S.W. (2d) 649 38
Turley Adm'r v. *Barnes*, 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808 ..... 6, 7
U.S.C.A. Const. Amend. 14, Mo. St. Ann. Const. Art. 2, Sec. 30 70
U.S. Fidelity and Guaranty Co. v. *Shields*, 157 Ky. 371; 163 S.W. 203 38
Waybright v. *Columbian Mutual Life Insurance Co.*, 6 Cir., 122 F. (2d) 245 23
White v. *Crump*, 19 W.Va. 583, 595 68
Ralph Wolff & Sons v. *New Zealand Insurance Co.*, 248 Ky. 304 23
Wren's Ex'r v. *Wren's Ex'r*, 126 Ky. 704; 104 S.W. 737; 31 Ky. Law Rep. 1096 38
Zeigler v. *Railroad Co.*, 58 Ala. 599 68

OTHER AUTHORITIES

KRS 25.170 (1062; 1065) 48
KRS 25.175 (KS 3858) 38, 47
KRS 25.190 (1066; 1067) 1893 c 221, Sec. 46, 47 ....35, 50
KRS 25.200 (1067) 9, 35, 36, 46, 50
KRS 62.060 38
KRS 62.070 38
KRS 64.260 (396; 401; 407; 408; 1740) 50
KRS 287.220 38
KRS 395.255 51
KRS 395.310 ..... 11, 52
KRS 396.140 ..... 15, 16, 17
KRS 413.090 (2514) 9, 38, 53
KRS 413.120(12) 9

Page

KRS 446.070 (KS 466) 52
Article 5, Chapter 35, Ky. Statutes 43
44 ALR (2d) pp. 808, 809 38
Civil Code of Practice of Ky., Section 428 15
Civil Code of Practice of Ky., Section 429 .....5, 15, 40, 53
The Fourteenth Amendment of the Constitution of the United States 3

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 15 55
Rule 56 34

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, (formerly Fidelity and Columbia Trust Company), JOINT ADMINISTRATORS with the Will Annexed OF THE ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit

---

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner Patricia R. Smith, prays that this Court grant a rehearing of its Order of March 15, 1965, denying the Petition For Writ of Certiorari, 85 S. Ct. 1024, (1965),

and that a writ of certiorari issue to review the summary judgments of the Court of Appeals for the Sixth Circuit in the above-entitled case as prayed for in the Petition For Writ of Certiorari filed on January 16, 1965, herein.

On March 16, 1965, counsel for the Petitioner filed in the United States Court of Appeals for the Sixth Circuit, a "Motion To Stay Issuance Of Mandate On The Order Filed And Entered On March 15, 1965, In The Above-Entitled Case, Which Is Now 'No. 839' In The Supreme Court Of The United States, Denying The Petition For Writ Of Certiorari, Until April 9, 1965, And To Stay The Mandate Until Final Disposition Of A Petition For Rehearing To Be Filed For Patricia R. Smith In The Supreme Court". The said Motion was granted and an Order was filed and entered on April 1, 1965, to stay the Mandate until April 9, 1965.

On April 2, 1965, before the expiration of twenty-five days from the day the Order was entered on March 15, 1965, denying the Writ of Certiorari, counsel for the Petitioner filed in this Court, a "Motion For An Extension Of Time Within Which To File A Petition For Rehearing On This Court's Order Denying The Petitioner's Petition For Writ Of Certiorari". The said Motion was granted by the Honorable Potter Stewart, and an Order was filed and entered in the within case in this Court on April 2, 1965, extending the time to and including May 10, 1965.

On April 7, 1965, counsel for the Petitioner filed in the United States Court of Appeals for the Sixth Circuit, a second "Motion To Stay Issuance Of Mandate An Additional Period Of Time, Pending The Filing Of, And The Ruling On A Petition For Rehearing On The Order Of The Supreme Court Denying The Petition For Writ Of Certiorari". The said Motion was granted and an Order was filed and entered on April 17, 1965, to stay the Mandate until May 10, 1965, and that the stay shall continue until the final disposition of the case by the Supreme Court.

JURISDICTION OF THIS COURT

The statutory provision believed to confer upon this Court jurisdiction to review the decree in question by writ of certiorari is invoked under 28 United States Code, Section 1254(1), Rule 19 of the Rules of the Supreme Court of the United States, and under the Fourteenth Amendment to the Constitution of the United States.

This Petition for Rehearing is filed pursuant to Rule 58 of the Rules of the Supreme Court of the United States.

The grounds upon which it is based are that there are other substantial grounds set forth herein available to the Petitioner which were not previously presented.

STATEMENT OF FACTS

At the time this Court's Order was filed and entered on March 15, 1965, denying the Petition for Writ of Certiorari, counsel for the Petitioner Patricia R. Smith, had been unable to file a Reply Brief to the Brief filed on February 15, 1965, for the Respondents, The Louisville Trust Company and the Citizens Fidelity Bank and Trust Company, due to the fact that on February 18, 1965, counsel for the Petitioner underwent an operation for a cancer on his neck, and there followed a series of X-Ray treatments, and he was incapacitated for some six weeks, and due to the strain and worry from sudden realization that there may be complications or additional operations, counsel for the Petitioner could not, and did not file a Reply Brief, to the Brief filed for the Respondents herein. The failure to so do naturally minimized (or hurt) the cause of the Petitioner. For that reason this Petition For Rehearing has to contain, or will be somewhat longer than the average Petition For Rehearing filed in this Court.

1.

Denial of Due Process of Law

Petitioner Patricia R. Smith, has been denied due process of law in that she is being required to pay seventy-three thousand seven hundred fifty-six dollars and ninety-eight cents ($73,756.98) for administrators' and attorneys' fees

for their purported representation of the estate of John A. O'Brien, deceased, without a trial of this case, without her day in court, and without any jurisdictional determination as to the merits of these claims against her. Further, Mrs. Smith was denied the right to have a trial on the issues raised by her Answer and Counterclaim, and to surcharge the Joint Administrators' purported final settlements of their accounts of the Estate of John A. O'Brien, and she was denied the right to surcharge the Joint administrators for interest on cash due her which was held by them, for losses resulting from maladministration, misrepresentation, negligence and fraud in their administering the O'Brien estate. It was necessary in the Petition for Writ of Certiorari to outline in detail the maladministration by the two Trust Companies of the O'Brien estate, and wherein in the Petitioner's original Counterclaim filed with her original Answer on November 12, 1956, in this case, she sought damages for the Trust Companies' breaches of duty and trust as Joint administrators, in forcing her to consent to the sale of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, that her consent was obtained by duress, and that she has been damaged by the duress practiced upon her. Some of the acts constituting the duress were alleged to be the Joint administrators' willful withholding of principal and income of the estate, initiation of unnecessary and expensive litigation, exhausting the defendant Mrs. Smith, financially, and threatened additional unfair and oppressive expense of litigation and withholding of the estate, bringing the defendant Mrs. Smith to a point of discouragement and despair, and fear of loss of her estate, so that she was not in a position to contract freely or negotiate a fair sale of her partnership interest. Because of the volume of the pleadings, the basic constitutional issue may have been submerged. The facts in this regard are relatively simple.

The complainant Trust Companies would have this court believe this is a cause of action under KRS 396.140 to recover an overpayment to Petitioner from the estate of John

A. O'Brien, deceased, of which complainant Trust Companies are Joint administrators. Instead of simply pleading this, the Joint administrators in their complaint filed against Mrs. Smith on September 13, 1956, set forth what they contended were the facts pertaining to the negotiations for the sale of the partnership interest, and the value of the interest owned by Mrs. O'Brien-Smith in the partnership of the tobacco company of Edward J. O'Brien & Company and its four subsidiaries, and a complete history of their handling and representing the O'Brien estate for over 22 years from 1934 to 1956.

The within suit is a settlement suit and is the third settlement suit filed in the Jefferson Circuit Court by the Joint administrators to settle their accounts of the Estate of John A. O'Brien, wherein the Joint administrators were trying to obtain court approval for their sale of Mrs. Smith's partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, and for the Circuit Court's approval of their administration of the estate, after having failed and refused for the third time to draw their complaint to comply with the requirements of Section 429 of the Civil Code of Practice of Kentucky, in order to get the approval of the Jefferson Circuit Court. This refusal has continued despite two other lawsuits filed in the O'Brien Estate and against Mrs. Smith by the Joint administrators in Kentucky Courts, covering a period of twenty-eight years, all of which were won by Mrs. O'Brien-Smith.

From July 1951, through January 1952, the Joint administrators held *ex parte* hearings in the O'Brien Estate in Jefferson County Court, which entered a Judgment on March 5, 1952, and an Amended Judgment on May 1, 1952. No exceptions were filed by Mrs. O'Brien-Smith, to the so-called Judgment or Amended Judgment of March 5 and May 1, 1952, filed and entered in County Court, and she was not present in person, or by counsel at any of the proceedings had by the Joint administrators in the County Court. She was then attempting to effect the restoration of the Records of the O'Brien Estate, which had been lost

or stolen because the Joint administrators had refused to legally restore the records. (See the case of *Smith* v. *Louisville Trust Company and Citizens Fidelity Bank & Trust Company,* 262 S.W. 2d 479, November 20, 1953).

Since no exceptions of any kind were filed by Mrs. O'Brien-Smith to any of the claims or items confirmed in the report, or the supplemental report of the County Court Commissioner, and the award and approval by the County Judge of the Commissioner's report in the so-called judgments of March 5, 1952, and amended on May 1, 1952, when the report was approved and recorded, *it simply became a ministerial act,* and the settlement so made and recorded became *prima facie* evidence between the parties interested and under the laws of Kentucky the claims and items of the said purported final settlement of the accounts of the Joint administrators were subject to be surcharged and falsified within 5 years from the day the so-called judgment was filed and entered, approving the County Court Commissioner's Reports.

We are supported in the above contentions by the following cases found in the Annotations from the Statutes of Kentucky, from the year of 1873 to the Kentucky Revised Statutes of today, which holds as follows:

> "1. The confirmation of a settlement is a ministerial rather than judicial act. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 510-515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."
>
> "2. A confirmation of a settlement is only prima facie evidence, and may be questioned on its merits by a bill in chancery. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."
>
> "3. Persons who do not file written exceptions or contest in the county court the validity of charges complained of, may have the alleged errors reviewed by a bill in chancery. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r.* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."
>
> "4. A settlement is not conclusive, either on the parties or on the Court making it. *It is not conclusive*

in any other court, but is only prima facie evidence, subject to be surcharged and falsified. Turley's Adm'r v. *Barnes*, 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."

"5. A verbal objection at the time of settlement is not equivalent to the filing of formal written objections. *Turley's Adm'r* v. *Barnes*, 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."

"6. A formal entry of the order of confirmation of the settlement, in the absence of exceptions, is not a final judgment from which appeal can be taken. *Turley's Adm'r* v. *Barnes*, 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."

Mrs. O'Brien-Smith endeavored to surcharge and falsify the purported final settlement of the accounts of the Joint administrators of the O'Brien Estate, by the filing of a Motion For Leave To File Her First Amended Answer and First Amended Counterclaim, with the exhibits "A" to "G", which were tendered therewith on February 23, 1957, in the within case, in the office of the Clerk of the District Court. (A. "B", pp. 165a-330a.) Exhibits D, E and F, were copies of certified copies of the Joint administrators' receipts and disbursements filed with their three purported final settlements of their accounts of the O'Brien Estate in County Court on June 21, 1950, January 7, 1952, and on August 7, 1952, yet the District Court overruled Mrs. Smith's Motion For Leave To File *The Receipts and Disbursements, which the Joint administrators failed to file with their Complaint in the Jefferson Circuit Court for the final settlement of their accounts of the O'Brien Estate.* The said Motion was denied by the District Court, which was upheld by the Court of Appeals.

The District Court, on the basis that it lacked probate jurisdiction, refused a trial of the issues raised by Mrs.

---

[1] The Petitioner filed with her Petition For Writ of Certiorari, a complet and correct copy of the entire Transcript of Record in the above-entitled case from the District Court, and the United States Court of Appeals for the Sixth Circuit, which was all printed in three Volumes, and a complete and correct copy of the Kentucky statutory provisions involved, Fourteenth Amendment, Federal

Smith in her first answer, which denied and controverted the allegations of the complaint in more than 21 numbered paragraphs, and she denied all other affirmative allegations made by the Joint administrators in their complaint, (A. "B", pp. 121a-139a), and by Mrs. Smith's first amended answer, and first amended counterclaim, (A. "B", 164a-330a; A. "C", pp. 1703a-1989a), but the District Court accepted the settlement and the Commissioner's report which was recorded only as *prima facie* evidence in the O'Brien Estate, and the so-called judgment of the County Court confirming the report, called it a final judgment, and gave a summary judgment against Mrs. O'Brien-Smith for seventy-three thousand seven hundred fifty-six dollars and ninety-eight cents ($73,756.98), in direct violation of the statutes and laws of Kentucky, governing the final settlement of the accounts of administrators of estates in Kentucky, which is clearly set out herein.

The District Court and the Court of Appeals completely missed the point when they called the confirmation of the purported final settlement of accounts, a final judgment in the County (Probate) Court. Thus causing a grevious error and a flagrant miscarriage of justice in this case.

Do not let the statute in Kentucky regulating the probate of a will, be confused with the administration of estates in Kentucky.

Rules of Civil Procedure, the four cases she won against the Joint administrators in the Kentucky Court of Appeals, and four Kentucky cases governing the final settlement of the accounts of an administrator in Kentucky, in one Volume marked Appendix A, which consists of fifty-six and one-half printed pages; Appendix B is Volume I of the printed Transcript of Record consisting of pages 1a through 1279a; Appendix C is Volume II of the printed Transcript of Record consisting of pages 1280a through 2175a; Appendix D is Volume III of the printed Transcript of Record consisting of pages 2175a through 2625a, all four Volumes were clearly stamped on the front of each that they were an Appendix to Petitioner's Writ of Certiorari filed on January 16, 1965, and each Volume had the signature of her counsel Walter B. Smith on the last page thereof.

Our research does not reveal that any of the other forty-nine (49) states have probate proceedings similar to the ones practiced under Kentucky law, wherein an accounting can be filed in County (Probate) Court as a final settlement and if no exceptions are filed as provided under Kentucky law and KRS 25.200, the filing of said settlement is a ministerial act, unless within five years an interested party may file a suit in equity in the Circuit Court to surcharge and falsify any one, or all of the claims and items in the settlement of accounts or final settlement of the estate in question. So the filing of a final settlement is never a final judgment in Kentucky, future litigation in any estate is only tolled by the statute of limitations KRS 413.120(12) (KS 2515; 2518) at the end of five years.

A judgment is not final where it is impossible for the party in whose favor the decision is rendered, cannot enforce by execution what has been adjudged.

If the so-called Judgment of March 5, 1952, and the Amended Judgment of May 1, 1952, had been final Judgments, Why Did the Joint Administrators Fail To Levy And Enforce By Execution The Aforesaid Judgments In The County Court?

Just why did the Joint administrators file another settlement suit the within suit, instead of enforcing the purported "final" Judgments rendered March 5, 1952, and May 1, 1952, in County (Probate) Court? Frankly, the answer is that these so-called final Judgments were ministerial acts in the County (Probate) Court proceedings under Kentucky law, and Kentucky statutes, and specifically under KRS 25.200 which states that settlements "made and recorded shall be prima facie evidence between the parties interested".

County (Probate) Courts in Kentucky never have had, nor do they now have jurisdiction of the res. *In fact, the qualifications for the County (Probate) Judges are simple, the Judge must be twenty-five years of age and a voter.* Yes, there is one other pre-requisite. He must be elected,

and as such County (Probate) Judge he has no jurisdiction to enter a final judgment.

If the District Court and the Court of Appeals for the Sixth Circuit did not have jurisdiction over a Probate Matter to decide every issue and question involved in this case, then they did not have a jurisdictional right to rule that the issue of the sale of Mrs. Smith's partnership interest in the Edward J. O'Brien and Co. and its four subsidiaries was barred by the rule or res judicata that the joint administrators and their attorneys should be awarded $73,756.98 for fees from Mrs. Smith and that the joint administrators can retain the $40,000.00 cash belonging to Mrs. Smith, without paying her $84,000.00 compounded interest due her for their retaining cash over a period of 29 years.

If the District Court lacked probate jurisdiction to try this case on the issues raised by Mrs. Smith's original Answer and her original Counterclaim in which she denied and controverted the allegations of the Complaint, and all their affirmative allegations made by the Joint administrators in their Complaint, and by Mrs. Smith's First Amended Answer and First Amended Counterclaim and her Second Amended Answer and her Second Amended Counterclaim tendered, (there is much precedent to the contrary—see *Griffith* v. *Bank of New York*, 147 F. 2d 899 (1945); *Paul, et al.* v. *Girard Trust Company*, 124 F. 2d 809 (1941); *Rogers* v. *Girard Trust Company*, 159 F. 2d 239 (1947); and the ruling of this Court in the case of *W. J. Meredith, et al.* v. *City of Winter Haven*, 320 U.S. 228 (1943), then the District Court also lacked probate jurisdiction to accept the settlement of accounts of the Joint administrators and the County Court Commissioner's report and the judgment of the County Court confirming the Commissioner's reports as a final judgment. As the reference cases note, supra, the decision of the Sixth Circuit Court of Appeals, in the within case, is in conflict with decisions of two other Circuit Courts of Appeal, and it is in conflict with the Sixth Circuits own ruling in the case

of *Rogers* v. *Girard Trust Company*, 159 F. 2d p. 239, and it is in conflict with this Court's ruling in the case of *Meredith* v. *City of Winter Haven*, 320 U.S. 228, (1943), and under Rule 19 of the Supreme Court of the United States a writ of certiorari should issue.

2.

The District Court Denied Mrs. Smith the Right of a Trial to Prove That the Two Trust Companies Owe Her More Than $84,631.95 Interest on Cash Now Held By Them, Belonging to Her

The Joint administrators already owe to the O'Brien Estate, of which Mrs. Smith is the sole beneficiary, more than the amount of the summary judgments, by virtue of Kentucky law, and Kentucky statutes. KRS 395.310 states and holds that:

> "A personal representative, after the expiration of two years from the time he qualifies, shall be charged with interest on the surplus assets in his hands from that period, and before the expiration of two years shall be charged with all interest realized on assets."

(1) The Joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $25,000.00 cash belonging to Mrs. Smith which they held in their banks from February 11, 1936, to June 28, 1946, which amounts to ..... $20,779.38.

(2) The Joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $40,000.00 cash belonging to Mrs. Smith which they held in their banks from June 28, 1946 to November 9, 1962, which amounts to $63,852.57
cash, which they still have in their possession as well as the cash in the amount of $40,000.00. The interest alone to November 9, 1962, amounts to ..... $84,631.95.

When the District Court denied Mrs. Smith the right of a trial in this suit filed by the Joint administrators against

her, to settle their accounts of the O'Brien Estate, she was denied the right to introduce proof, on the interest due her from the Joint administrators, and other proof of what the Joint administrators owe her.

3.

The Joint Administrators and Their Attorneys are Not Legally Entitled to Any Interest on the Fees Claimed

In contrast, the Joint administrators and their attorneys were allowed interest on the fees awarded to them by the District Court, and the Court of Appeals, which under Kentucky law they are not legally entitled to interest on their fees, even if this was an overpayment suit, which it is not. (See the case of *Reder and Others, Heirs of Hill, against Hill's Executor and other Heirs*, (1837) 5 Dana (35) 37, 147 Ky. 323, 144 S.W. 20 which held:

> "Seventh. It was erroneous to decree interest upon the balances found to be due from the complaints to the executor, for over payments. They grow principally, if not entirely, out of the allowances made to the executor, for personal services &c. on which he is not entitled to interest. Their existence, as well as amount, was dependent upon the final settlement before the Chancellor. And the over payments, if they may be so called, were made by the executor in his own wrong."

In addition to the above two Kentucky statutes, the Joint administrators have violated more than eight other Kentucky statutes governing the administration of, and the final settlement of their accounts of the O'Brien Estate, which was approved by the District Court and upheld by the Court of Appeals, which is fully set out herein; and the Joint administrators have not yet filed a final settlement of their accounts of the O'Brien Estate, and as long as they hold cash in their possession belonging to the said Estate, and to Mrs. Smith, the said settlement cannot be a final settlement under the Kentucky Revised Statutes, and the Kentucky law, and the awarding of the administra-

tors and attorneys fees are premature, even if any fees are due at all.

When Mrs. Smith was denied the right of a trial in this case, she was denied the right to introduce the proof that the Joint administrators are not entitled to any fees at all, and that their attorneys are not entitled to any additional fees, when they have already been paid twenty-five thousand ($25,000.00) dollars, before they started filing their three lawsuits in the O'Brien Estate, the first one being filed in 1937.

In the statement of the case in the Petitioner's petition for *certiorari* it was necessary to set forth some of the background of this case, covering a period of some twenty two (22) years, in order to show wherein the Joint Administrators of the Estate of John A. O'Brien have continuously breached their fiduciary duties imposed upon them by the Statutes and laws of Kentucky, governing the final settlement of an estate, and in failing and refusing to file a final settlement of the O'Brien Estate on March 1, 1936, in the Jefferson County Court, and for a further period covering nineteen years, even after the Court of Appeals of Kentucky had ordered and directed them to, in three separate opinions rendered in 1948, 1950, 1951, in the Joint administrators first two settlement suits, filed by the Joint administrators in the O'Brien Estate in the Jefferson Circuit Court, and in a fourth opinion from the Court of Appeals of Kentucky rendered in 1953 against the Joint administrators, in **the Joint administrators Appeal from the Rule Issued against them, and the Order thereon, by Judge Horace M. Barker, Judge of the Jefferson County Court, in 1949**, to file a final settlement of the O'Brien Estate by June 1, 1949, in which the Joint administrators filed an Appeal on May 26, 1949, to the Jefferson Circuit Court. The Joint administrators then had a supersedeas issued and served on Judge Horace M. Barker, Judge of the Jefferson County Court, on June 2, 1949, to stay all proceedings in the final settlement of the O'Brien Estate in

County Court. After that appeal was filed by the Joint administrators, they took all of the original Records in the Estate of John A. O'Brien, from the County Court and filed them with their appeal in the Jefferson Circuit Court, the original Records were never seen again or recovered. They were lost or stolen and it took four years of litigation, an opinion from the Court of Appeals of Kentucky on November 20, 1953, and an order thereon from the Jefferson Circuit Court, to compel the Joint administrators to restore the lost or stolen records, legally as required by Kentucky law to wit until October 1954. (See Petitioner's Exhibit No. 32, in the printed Transcript of Record Appendix "B", pages 713a to and including page 932a, and Petitioner's printed **Appendix "A", pages 15-36, for complete and correct copy of the four opinions of the Court of Appeals of Kentucky in lawsuits and appeals which were filed and prosecuted by the Joint administrators, and won by Mrs. Smith, namely:**

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 308 Ky. 189; 213 S.W. (2d) 987 (June 8, 1948), Rehearing denied Oct. 29, 1948. (A. "A", pp. 15-26).

The Louisville Trust Co. and Citizens Fidelity Bank and Trust Co. v. *Smith*, 313 Ky. 15, 230 S.W. (2d) 64 (May 16, 1950). (A. "A", pp. 27-29).

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 237 S.W. (2d) 836 (March 6, 1951) Rehearing denied April 17, 1951 (in which Mrs. Smith was granted a permanent injunction against the Joint administrators). (A. "A", pp. 29-32).

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479 (November 20, 1953). (A. "A", pp. 32-36).

The lawsuits filed and prosecuted by the Joint administrators and their appeals filed therein, included thousands of pages of testimony and briefs; they were unnecessary, expensive, incessant harrassing litigation; they were not for

the benefit of the O'Brien Estate, but for the benefit of the two Trust Companies.

The reason that the Joint administrators failed and refused to meet the requirements of Sections 428 and 429 of the Civil Code of Practice of Kentucky in their allegations in the two Petitions drawn and filed in their First Settlement Suit of the O'Brien Estate in the Jefferson Circuit Court, and after the first opinion was rendered therein they filed an Amended Petition therein, and the Petition drawn which they filed in their Second Settlement Suit of the Estate was because the Joint administrators did not want to state or reveal "**the nature and value of the property, real and personal, of the decedent's (John A. O'Brien's) Estate, so far as known to the Plaintiff,**" (Trust Companies) as is required by Section 429 of the Civil Code of Practice of Kentucky. (See the three Opinions, supra, also see A. "A", pp. 15, 19, 20, 21, 25, 26, 27, 28, 29, 31, 32), and to this day the Joint administrators have not revealed the nature and value of the property, real and personal of the decedent John A. O'Brien's Estate, and **THAT IS WHY THEY HAVE LABELED THE WITHIN SUIT "THEIR OVERPAYMENT SUIT"**, which does not comply with the requirements of KRS 396.140 just the same as their three petitions in their first two settlement suits failed to meet the requirements of Section 429 of the Civil Code of Practice of Kentucky as so held by the Court of Appeals of Kentucky in three opinions against the two Trust Companies, supra.

It is for that kind of illegal representation by the two Trust Companies and their attorneys for which they have been awarded on the Summary Judgments in the within case additional fees of $73,756.98, in addition to the $25,000.00 the attorneys have already been paid from the O'Brien Estate by the Summary Judgments of the District Court, and the Court of Appeals for the Sixth Circuit, in violation of the statutes and laws of Kentucky in the final settlement of estates in which Mrs. Smith was denied the right of a trial thereon.

4.

Nature of Suit.

This suit filed by the two Trust Companies the Respondents, on September 13, 1956, is not a statutory suit under KRS 396.140, to recover from Petitioner Mrs. Smith for an overpayment (or over-distribution) to her, as a distributee of the estate of her former husband, John A. O'Brien; it is a third settlement suit of the O'Brien Estate, for the sole purpose of getting the approval of the Court for the sale of Mrs. Smith's partnership interest in the E. J. O'Brien & Company and its four subsidiaries, by the Joint administrators, and the Court's approval of the Joint administrators handling and administration of the O'Brien Estate which they have illegally withheld since March 1, 1936, in violation of KRS 25.175, (A. "A", pp. 4-5), and to get additional attorneys fees of fifty thousand ($50,000.00) dollars, in violation of their written agreements in addition to the twenty five thousand dollars ($25,000.00), which they have already been paid from the O'Brien Estate, and to get twenty three thousand seven hundred fifty six dollars and ninety-eight cents ($23,756.98) fees for the two Trust Companies, which violates their contract for fourteen thousand ($14,000.00) dollars, which **the District Court and the Court of Appeals for the Sixth Circuit, awarded to the Joint administrators on a County Court Judge's administrative award, a total of $73,756.98, which is over 22.8% of the total amount which the Joint administrators received for the sale of Mrs. Smith's partnership interest, and the stocks and securities Mrs. Smith inherited from her husband John A. O'Brien.** The $200,000.00 life insurance under which Mrs. O'Brien-Smith was the sole beneficiary, was not a part of the Estate, did not come under the administration of the Estate, by the Joint administrators, and they had no legal right to mix it up with the Estate, or in their sale of the partnership interest owned by Mrs. O'Brien-Smith, to James G. O'Brien, brother of John A. O'Brien. (A. "C", Exhibits No. 55, 56, 57, 59, 60, pp. 1927a-1940a).

The reason the Joint administrators call this suit their "overpayment suit" is because the Court of Appeals of

Kentucky in the Joint administrators' Second Trumped-up Settlement Suit of the O'Brien Estate, granted to Mrs. Smith a permanent injunction against the Joint administrators, enjoining the Joint administrators from prosecuting their Second Settlement Suit of the O'Brien Estate, and from ever filing a third settlement suit of the Estate, supra. (A. "A", pp. 29-32).

The petition or complaint filed by the Joint administrators in this suit, does not comply with KRS 396.140; it fails to comply, just the same as their two petitions in their first two settlement suits, and their amended petitions therein, as held by the three opinions of the Court of Appeals of Kentucky, supra. (A. "A", pp. 15-32).

The petition in this case was not framed under that statute in its simplicity as it should have been because, under KRS 396.140, the petition should have said: "We the Trust Companies are the Plaintiffs, Mrs. Patricia R. Smith is the Defendant. We have paid so much over and above the amount that she was entitled to, we ask for judgment.'

Instead of saying that, the Joint administrators stated in their petition or complaint filed on September 13, 1956, (consisting of 28 pages and their Exhibit 1, thereto consisting of 39 pages), what they set out and contended were the facts pertaining to the value of, and the history of the negotiations for the sale of the partnership interest owned by Mrs. O'Brien-Smith in the partnership of the tobacco company of Edward J. O'Brien and Company and its four subsidiaries, and a complete history of their handling and representing the O'Brien Estate for over twenty-two (22) years from 1934, to 1956, which Mrs. Smith had a legal right to answer and controvert, and to have a trial on the issues which she was denied by the District Court which was upheld by the Court of Appeals.

Now the Defendant-Petitioner Mrs. Smith, in her original Answer filed in this case on November 12, 1956, denied and controverted the allegations in the Complaint, (A. "B",

pp. 121a-134a) and filed a counterclaim with her original Answer, (A. "B", pp. 134a-139a). On February 23, 1957, she filed a Motion for leave to file an amended answer and an amended counterclaim, with Exhibits A to G, which were tendered therewith, (A. "B", pp. 164a-330a). In the first amended answer and amended counterclaim which was tendered before the five year period expired from March 5, 1952, wherein she sought to surcharge and falsify the purported final settlement of the accounts of the Estate, there were over eighty (80) exceptions to items and disbursements made by the Joint administrators in the administration of the O'Brien Estate. On May 15, 1961, Mrs. Smith filed a Motion for leave to file a Second Amended Answer and Second Amended Counterclaim, with Exhibits 42 to 75, which were tendered therewith, but both Motions were denied by the District Court, and upheld by the Court of Appeals for the Sixth Circuit. (A. "C", pp. 1703a-1989a).

5.

There Were Not Any O'Brien Family Controversies.

The Petitioner Mrs. Smith did not see any member of the O'Brien family after the funeral of Mr. O'Brien, and she did not have any controversies with any of the O'Brien family after the death of Mr. O'Brien, and all that she knew about any contentions that any member of the O'Brien family were making were told to her by the Joint administrators and their attorneys, in regard to her interest in the partnership in the E. J. O'Brien and Co., and the life insurance on the life of John A. O'Brien, and his security holdings. There is no proof in the record of the within case to substantiate the Respondents' contentions. Mrs. Smith is fully upheld in her statements in regards to the Joint administrators failure to disclose the true value of the partnership interest, the misrepresentations, threats, coercion and undue influence exerted upon her as alleged in her Answer and Counterclaim filed herein, by the Deposition of Edward C. Wirotzious a government employee,

(see Defendant-Petitioner's Exhibit No. 35, Printed Transcript of Record, A. "B", pp. 1230a-1277a).

THERE WAS NOT ANY TRANSCRIPT OF TESTIMONY OF ANY HEARINGS OR PROCEEDINGS OF ANY KIND OR DESCRIPTION FILED IN THE WITHIN CASE, either from the Rescission Suit filed and lost by Mrs. Smith, or the two Trumped-up Settlement Suits of the O'Brien Estate filed and lost by the Joint administrators in the Courts of Kentucky, and **there was not any Transcript of Testimony filed in the within case from the hearings and proceedings had in the Jefferson County Court by the Joint administrators, as the Docket Entries which were printed from Certified authenticated copies in the three volumes of the printed Transcript of Record clearly show, which were filed in the within case, in this Court, on January 16, 1965, by counsel for Mrs. Smith,** which **the Joint administrators admit are true and correct,** and have made many references thereto in their briefs in the Court of Appeals for the Sixth Circuit, and in this Court, a printed copy of each volume was served on them which they have in their possession.

It was the Joint administrators, and not Mrs. Smith who sold her partnership interest in E. J. O'Brien & Company and its four subsidiaries for three hundred eighty thousand ($380,000.00) dollars on November 5-15, 1935.

The Court of Appeals of Kentucky in the Rescission Suit, which was against only the brothers of John A. O'Brien held that Mrs. O'Brien, (now Smith) "was the sole beneficiary of the last will and of the Estate of John A. O'Brien." Thus, she was the sole beneficiary of his security holdings, and that "she was the sole beneficiary of Mr. OBrien's $200,000.00 life insurance," because she was the only beneficiary named in the policies, "there was no insurance trust agreement making anyone else a beneficiary endorsed on the policies." (A. "C", Exhibit 52, Vol. II, p. 1896a). (A. "B", see copies of insurance policies Defendant-Petitioner's Exhibits No. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, pp. 503a-635a), filed with Mrs. Smith's Pleading entitled,

> **"DEFENDANT'S SUPPLEMENTAL AFFIDAVIT OF PATRICIA O'BRIEN-SMITH IN OPPOSITION TO 'PLAINTIFFS' JOINT ADMINISTRATORS' MOTION FOR A SUMMARY JUDGMENT'** and (Mrs. Smith's) 'Second Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim, Filed Herein on November 12, 1956', Tendered on August 27, 1959, with Thirty-five (35) Exhibits attached thereto, *Filed Pursuant to Order Dated August 28, 1959.*" (*Transcript of Record*, A. "B", pp. 472a-1279a).

Thus, the Joint administrators and their attorneys who were also Mrs. O'Brien-Smith's attorneys, gave Mrs. Smith false advice, when they told her that they were selling her partnership interest three years before the partnership agreement provided it could be sold, because the claims which they contended were being made by the O'Brien family, were legitimate claims, when in truth and fact by the Court of Appeals of Kentucky's ruling in favor of Mrs. Smith in the Rescission Suit, they were only bogus claims, and should not have been given any consideration.

6.

The Ruling By The Court of Appeals For the Sixth Circuit and the Ruling By the District Court (Judge Kent) In This Case, That the Claims of Fraud Against the Joint Administrators Set Forth In Mrs. Smith's Original Counterclaim, Are Barred By the Rule of Res Judicata, Is In Conflict With the Decision of the District Court (Judge E. B. Freed) On the Same Issue, And Against the Same Two Trust Companies.

The only lawsuit which was ever filed by Mrs. O'Brien-Smith against the Respondent Trust Companies the Joint administrators, and it was dismissed by her without prejudice, there was no testimony given, it never went to trial, and it was styled:

> "In the United States District Court for the Western District of Kentucky at Louisville, No. 870, Patricia R. Smith v. The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, filed on March 16, 1945, which was dismissed without prejudice by Mrs. Smith on March 10, 1949."

In that case Judge E. B. Freed, Federal District Judge of Cleveland, Ohio, who was sitting by designation in that case, **after reading the entire Rescission Suit Record, and the "2,000 pages of evidence in the case," of (O'Brien v. O'Brien, 294 Ky. 793; Cert. Den. 321 U.S. 767; reh. den. 322 U.S. 769)**, which was against only the brothers of John A. O'Brien which Mrs. O'Brien-Smith lost, **and after reading the entire orinted Transcript of Record in the Joint administrators' first trumped-up settlement suit of the O'Brien Estate, consisting of eight hundred ninety-two (892) printed pages, (which they lost, and it was won by Mrs. Smith)**, Judge Freed ruled that,

> "the issue of fraud against the Joint administrators in making the sale of Mrs. O'Brien-Smith's partnership interest, WAS NOT (AND IS NOT) BARRED BY THE RULE OF RES JUDICATA, BY THE JUDGMENT OF MAY 23, 1940, IN HER RESCISSION SUIT,"

in the case of *O'Brien* v. *O'Brien*, *supra*, and entered an order overruling the Joint administrators' Motion for Summary Judgment in that case, (which should have been done in the within case) and rendered an opinion and filed and entered an order, which are as follows:

"In The
District Court of the United States
For the Western District of Kentucky
Louisville Division

"Civil Action No. 870

Patricia R. Smith, *Plaintiff*.

vs.

The Louisville Trust Company, a corporation and, Citizens Fidelity Bank & Trust Company, a corporation, *Defendants*.

ORDER

"This matter came on for hearing on the motion of the defendants, the Louisville Trust Company and

Citizens Fidelity Bank and Trust Company, for a summary judgment under favor of Rule 56 of the Rules of Civil Procedure, the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment be and is hereby overruled.

/s/ E. B. FREED"
United States District Judge"

November 7, 1947"

"In The
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
Louisville Division

"Civil Action No. 870

PATRICIA R. SMITH, *Plaintiff*,

vs.

THE LOUISVILLE TRUST COMPANY, a corporation and, CITIZENS FIDELITY BANK & TRUST COMPANY, a corporation, *Defendants*.

MEMORANDUM RE MOTION FOR SUMMARY JUDGMENT

"FREED, J.:

"Defendants' motion for summary judgment is predicated on the contention that two prior actions in the State Courts of Kentucky prohibit a right of recovery by the Plaintiff in this Court. The prior actions were referred to in the Defendants' answer, in the respective briefs of the parties and arguments of counsel as the 'Rescission Suit' and 'Settlement suit'.

"The record in the Settlement suit clearly discloses that the Court refused to adjudicate the precise claim of Plaintiff urged in this action. It refused to receive any evidence in support of the charge of negligence by the Defendant corporations in handling the estate of John O'Brien. Such ruling by that Court in the Settlement suit cannot conceivably result in a bar to the instant controversy.

"Whether the judgment in the (case of) *O'Brien* vs. *O'Brien*, (294 Ky. 793); (172 S.W. 2d 595); (Cert. Den. U.S. 767; reh. den. 322 U.S. 769); the Rescission Suit, is res judicata as to this action or constitutes an estoppel by judgment must be determined by the Law of Kentucky. *Oklahoma Packing C.* v. *Oklahoma Gas & Electric Co.*, (309 U.S. 4); *In re Potts 6 Cir.*, (142 F. (2d) 883); *Waybright* v. *Columbian Mutual Life Insurance Co., 6 Cir.*, (122 F. (2d) 245).

"To render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties to the action and identity of quality in the persons or parties for whom or against whom the claim is made. *Swift Coal and Timer Co.* v. *Cornett*, (249 Ky. 760); *Ralph Wolff & Sons* v. *New Zealand Insurance Co.*, (248 Ky. 304).

"In the case of *Prewitt* v. *Wilborn*, (184 Ky. 638); (212 S.W. 442), the Court of Appeals clearly pointed out the distinction between the doctrine of res judicata and estoppel by judgment as follows:

> 'A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties, upon the same cause of action, and a second suit between the same parties upon a different cause of action. In the first instance, the judgment is a complete bar to the second action, not only as to everything which was used in the first action to sustain or defeat the demand, but, everything, which the parties could have used properly for that purpose; but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estoppel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision and is not conclusive as to matters not decided, and the decision of which was not essential to the decision in the first suit, although issues may have been made in reference to them.'

"It is readily discernible from the examination of the Rescission suit and this action, that there is lacking

the identity of the quality of the parties necessary to bring the Rescission suit within the ambit of the doctrine of res judicata or estoppel by judgment. The principles of law laid down by the Kentucky courts applied to the causes of action in issue leads the court to the conclusion that the motion for summary judgment must be overruled.

/s/ E. B. FREED"
United States District Judge"

November 6, 1947"

Thus, we have a conflict of decisions of two District Courts, on the same question of *res judicata* and against the same two Trust Companies.

The Case of O'Brien v. O'Brien, 294 Ky. 793; Cert. Den. 321 U.S. 767; The Rescission Suit Was Not Adequately Before The Supreme Court For A Consideration of A Decision, and Mrs. Smith's Original Counterclaim Is Not Barred By the Rule of Res Judicata

In the case of *O'Brien* v. *O'Brien*, 294 Ky. 793; 321 U.S. 767; rehearing denied 322 U.S. 769; that was a suit filed by Mrs. O'Brien-Smith against the brothers of John A. O'Brien, only, for rescission of the sale of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, she lost that suit in the Jefferson Circuit Court and Court of Appeals, but in the opinion of the Court of Appeals of Kentucky, it held (1) "that Mrs. O'Brien-Smith was the sole beneficiary of the will and the Estate of John A. O'Brien"; (2) that the claims asserted on behalf of the brothers of John A. O'Brien under a purported insurance trust agreement on $200,000.00 life insurance, was not legitimate, and that Mrs. O'Brien was the only beneficiary named in the said policies; (3) that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the net sound market value of her partnership interest, but that it was the duty of her counselors and advisors to ascertain the true market value of her partnership interest,

and it named the joint administrators and their attorneys as Mrs. Smith's counselors and advisors. (See Mrs. Smith's Exhibit No. 52, pp. 1896a, A. "C", pp. 1902a, 1908a). That case, the rescission suit, was before the Supreme Court of which three of the questions were as follows:

> "1. That the denial by the trial court of the process of that Court by refusing in all material respects Mrs. Smith's motion for subpoena *duces tecum* resulting in denial to her of access to any single book of original entry of the partnership, or of its subsidiaries; or original document from which to ascertain or prove value, prevented her, in effect, from having her day in Court and amounted to the denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States." (Cases were cited to uphold the contentions.)
>
> "2. That the decision of the State Court being contrary to the admitted and uncontradicted facts and the well-established principles of law amounted to arbitrary deprivation of Mrs. Smith's property without due process of law and without a real hearing as contemplated under the Fourteenth Amendment to the Constitution of the United States." (Cases were cited.)
>
> "3. That where the Court found facts substantially correct and recognized correct rule of law applicable thereto, but failed altogether without reason to apply such rule of law to such facts as a result thereof there was unjust enrichment of trustee of expense of *cestui que trust*, such action amounts not simply to error, but there is a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States."

It was contended in the rescission suit, on behalf of Mrs. Smith that the denial by the trial Court (Jefferson Circuit Court) in the rescission suit of Mrs. Smith's motion for subpoena *duces tecum* in all material respects prevented her from proving one of the necessary elements of fraud and deceit. To show the true net sound market value of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, and thereby the falsity of the representations made to her, was absolutely necessary in

order for Mrs. Smith to make out her case. That if the Court afforded her its process and gave her a full hearing on all other elements necessary in order to make out a case of fraud and deceit for the rescission of the contract of sale and yet denied her the process of the Court by subpoena *duces tecum*, or otherwise, and denied her an opportunity to be heard at all upon this one necessary element of her cause of action, then she has, in effect, had no hearing at all.

In the rescission suit which was against only the brothers of John A. O'Brien in the trial of that case, Mrs. Smith was denied the right to see or inspect any original books of the Edward J. O'Brien & Company or its four subsidiaries, and was denied the right to have an audit made to determine the net sound market value of her interest in the said companies. No partial audit was ever made for her, either before, or in the rescission suit or since the rescission suit was filed and lost.

In the argument in the brief filed in this Court in the rescission suit, was that to constitute a hearing which satisfies due process it must be a real one and not a sham or pretense. (Cases were cited.) To satisfy due process a hearing must be a fair one, according the litigant an actual opportunity to present evidence in support of his contentions. (Cases were cited.)

To condemn without a hearing or to depart from established modes of procedure offends due process. (Cases were cited.)

In the brief filed in the case of *O'Brien* v. *O'Brien*, *supra*, in the Supreme Court in the rescission suit, (which was against only the brothers of John A. O'Brien), there were many references made therein to the Transcript of Record in the rescission suit, which included the opinion of the Jefferson Circuit Court therein, and the Court of Appeals of Kentucky, but when a certified copy of the Docket Entries of that case in this Court was obtained several years later, it showed that the Transcript of Record in the

rescission suit from the Kentucky Courts filed in this case in this Court, was never recorded on the Docket Entries of this case in the Clerk's office of this Court, therefore this Court did not see the Record. The number of this case was No. 490. (See Transcript of Record A. "D", Volume III, pp. 2423a-2425a). So, there were no records for this Court to see, to prove or disprove anything as stated in Mrs. Smith's Petition For Writ of Certiorari, in that case quite naturally, the Writ was denied. Even though it was denied, it was held by Judge E. B. Freed, United States District Judge, that the Judgment in the case of *O'Brien* v. *O'Brien*, *supra*, the rescission suit is not res judicata as to an action against the joint administrators for fraud in their sale of Mrs. Smith's partnership interest in the E. J. O'Brien & Company and its four subsidiaries. (See Writ of Certiorari pages 126a-136a).

7.

Respondent Joint Administrators' Partial Settlement of Their Accounts of Mr. O'Brien's Estate, in Jefferson County Court, Was Not a Final Settlement of the Estate and Three of the Reasons Are Set Out In the Opinion of the Court of Appeals of Kentucky, and Mrs. Smith Did Not Contest, Object To, Or Try To Prevent the Two Trust Companies From Filing A Settlement of the O'Brien Estate In Jefferson County Court.

The partial settlement of Mr. O'Brien's Estate filed in the Jefferson County Court by the Joint administrators on June 21, 1950, was not a final settlement of the Estate and cannot be as long as they retain cash belonging to the Estate and Mrs. Smith and for the many reasons as set forth in Mrs. Smith's Answer and Counterclaim, filed on November 12, 1956, (A. "B", pp. 121a-139a), her First Amended Answer and Amended Counterclaim, tendered with Exhibits "A" to "G", on February 23, 1957, (A. "B", pp. 165a-224a), and her Second Amended Answer and Amended Counterclaim, tendered with Exhibits 42 through 75 on May 15, 1961, (A. "C", pp. 1703a-1989a).

The Petitioner Mrs. Smith did not contest, or object to, or try to prevent the two Trust Companies from filing a

final settlement of the O'Brien Estate in County Court, in 1950, 1951, or any other time, because for over sixteen years she had resorted to every legal means available to force the two Trust Companies to file a final settlement of the O'Brien Estate in the Jefferson County Court, and the two Trust Companies had refused to file it; **they had defied the three rulings and opinions of the Court of Appeals of Kentucky against them, and the rulings of Judge Horace M. Barker, Judge of the Jefferson County Court,** as has already been set out herein.

The purported final settlement of the O'Brien Estate was filed on June 21, 1950; **it was after it was filed, that Mrs. Smith objected to the Joint administrators and their attorneys having expensive and costly hearings, in the Jefferson County Court before a commissioner, on their purported final settlement of the O'Brien Estate, for four main reasons, in which she was fully upheld by the Court of Appeals of Kentucky, (even though the injunction was not granted) in the case of Smith vs. Shamburger, 314 Ky. 850; 238 S.W. 2d 844,** which are:

(1) The Second Trumped-up Settlement Suit of the O'Brien Estate, filed by the Joint administrators on March 31, 1949, No. 313, 655, in the Jefferson Circuit Court, Chancery Branch, Second Division, with Exhibits "A" and "B" annexed thereto, consisting of forty-nine (49) printed pages, was still pending, and had not been disposed of. (See Exhibit 32, A. "B", pp. 881a-929a).

(2) The Injunction Suit filed by Mrs. Smith on April 21, 1949, No. 313,986 in the Jefferson Circuit Court, Chancery Branch, Second Division, to enjoin the Joint administrators from prosecuting their Second Trumped-up Settlement Suit in the O'Brien Estate, filed on March 31, 1949, in the Jefferson Circuit Court, to prevent the two Trust Companies from further wasting the assets of the O'Brien Estate, (which she later won in the Court of Appeals of Kentucky) was still pending, and had not been disposed of. (See Exhibit No. 32, A. "B", pp. 853a-858a), (A. "A", pp. 29-32).

(3) The Appeal filed by the Joint administrators in the Jefferson Circuit Court on May 26, 1949, **from the "Rule Issued" against the Joint administrators and the Order thereon, by Judge Horace M. Barker, Judge of the Jefferson County Court, to file a final settlement of the O'Brien Estate on June 2, 1949, and the injunction and supersedeas issued against Judge Barker in the County Court, by the Joint administrators, issued on May 26, 1949 and executed on June 2, 1949, to stay all proceedings in the County Court in the final settlement of the O'Brien Estate, was still pending,** even though a new Judge had been elected and took office in 1950, (Judge Shamburger). (See Exhibit 32, A. "B", pp. 931a-932a).

(4) All of the Original Records in the Estate of John A. O'Brien were still missing and had not been returned or legally restored, which were taken from the office of the Clerk of the Jefferson County Court to the Jefferson Circuit Court, when the Joint administrators filed their Appeal in the Circuit Court on May 26, 1949, from the Rule Issued against them and the Order thereon by Judge Horace M. Barker, Judge of the County Court, and had a supersedeas issued and served on Judge Barker, to stay all proceedings in the Estate of John A. O'Brien; and the records were not legally restored until October 1954, almost a year after the Court of Appeals ordered and directed the Joint administrators to legally restore the records in the O'Brien Estate. (see *Smith* v. *The Louisville Trust Company and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479; (November 20, 1953), also see A. "A", pp. 32-36).

The Court of Appeals of Kentucky upheld Mrs. Smith a fifth time, in her contentions, even though they overruled her Petition for Writ of Mandamus against Judge Shamburger in the case of *Smith* v. *Shamburger, Judge*, 314 Ky. 850; 238 S.W. 2d 844, January 26, 1951; Rehearing denied, May 11, 1951, the Opinion stated:

> (7) **"In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court;**

(1) A settlement suit filed (March 31, 1949) (and the Petition For An Injunction filed on) April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1946(9). The appeal is from an order of Hon. Horace M. Barker, former judge of Jefferson County Court, directing the Co-administrators to settle the estate. There has been no final disposition of either of these cases." * * * "If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement."

The above opinion and ruling clearly shows that the Joint administrators' Second Settlement Suit of the Estate, was pending in the Court of Appeals of Kentucky, Mrs. Smith's Injunction Suit against the Joint administrators was pending, and the Joint administrators' appeal filed in the Jefferson Circuit Court from the "Rule Issued" against them, and the "Order thereon" in the County Court, and the supersedeas issued on Judge Horace M. Barker by the Joint administrators, was still pending and those cases should have been disposed of before the Joint administrators had any more expensive hearings and proceedings in County Court under the new Judge Boman Shamburger, for which they and their attorneys have been awarded exorbitant fees by the District Court and upheld by the United States Court of Appeals for the Sixth Circuit.

Petitioner Mrs. Smith, has clearly shown that under the statutes and laws of Kentucky that she could not file an appeal to the Jefferson Circuit Court from such County Court so-called Judgment filed and entered on March 5, 1952, and the Amended so-called Judgment of May 1, 1952, because as has already been stated **Mrs. Smith was not present, and she was not represented by her counsel, at any of the hearings and proceedings in the Jefferson County Court, in 1951 and 1952 when the two Trust Companies and their two separate law firms were having hearings and proceedings** in County Court, and she did not file any exceptions in County Court to the purported final settlement of the accounts of the Estate of John A. O'Brien; and in

Mrs. Smith's Original Answer filed in this case on November 12, 1956, she specifically denied and controverted the allegations of the Trust Companies' Complaint, and stated on pages 127a-130a, A. "B", Volume I of the printed Transcript of Record, the following:

"—127a—

ANSWER AND COUNTERCLAIM OF DEFENDANT

"A COUNTY COURT JUDGE HAS NO JURISDICTION TO ENTER A JUDGMENT OR AMEND A JUDGMENT FOR A RECOVERY OF MONEY AGAINST PATRICIA O'BRIEN SMITH, OR ANYONE.

"15. Defendant denies that the so-called judgment filed and entered in the Jefferson County Court on March 5, 1952, in the Estate of John A. O'Brien, deceased, and the Amended Judgment filed and entered in the said estate on May 1, 1952, signed by Boman L. Shamburger, are valid or legal judgments upon which the Joint Administrators, The Louisville Trust Company and the Citizens Fidelity Bank and Trust Company, can collect any fee or fees or any other monies can be collected from Patricia O'Brien Smith. Defendant states that the Judgment referred to on page 12 of the Complaint herein, beginning with paragraph 2 on page 12 and covering pages 12, 13,

—128a—

ANSWER AND COUNTERCLAIM OF DEFENDANT

"14, and 15, 16, 17 and part of page 18, and also the Amended Judgment starting on page 18 and concluded on page 19 of the Joint Administrators' Complaint have no judicial effect since both the Judgment and Amended Judgment were erroneously entered and have been void since their inception and entry. Defendant denies that these Orders are now final or in full force or effect, and states further that there never has been any ground for such a Judgment or Amended Judgment. The hand written initialed

" 'O. K. Irvin Marcus,
Attorney for Louisville Trust Company,
O. K. Bullitt, Dawson and Tarrant,
Counsel for Citizens Fidelity Bank
and Trust Company,'

"approval on the so-called Judgment found on page 19 of the Complaint by the attorneys for the Joint Administrators cannot breathe life into those so-called Judgments which never have been, nor can they be of any judicial effect, and more particularly since the County Court Judge was not acting within the purview of the Statutes of Kentucky which confer upon him such powers as he has.

"**(1) A County Court Judge has no jurisdiction to enter a Judgment or an Amended Judgment for a recovery of money against Patricia O'Brien Smith or anyone else. This jurisdiction is vested in the Circuit Court, Quarterly Courts, Police and Magistrate's Courts.**

"(2) The Joint Administrators of the Estate of John A. O'Brien, Deceased, cannot cite any statute in Kentucky which provides that a County Court Judge has jurisdiction to enter a Judgment or an Amended Judgment for a recovery of money.

"(3) Patricia O'Brien Smith did not file any exceptions in the Jefferson County Court to the so-called final settlement of the Estate of John A. O'Brien, Deceased.

"(4) It has been consistently held by the Court of Appeals of Kentucky that where no exceptions are filed in County Court to the settlement of an estate that an order of a County Court confirming a settlement is not a final order or judgment and cannot be appealed from, and it was so held in the case of *Scott's Heirs* v. *Kennedy's Executor*, 12 B. M., 515, wherein it stated:

'There is in such a case, no judicial contest and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than a judicial act. Second. There is no final adjudication or determination in favor of one person or against another or upon any question of property or personal rights. Third. **The Settlement and its confirmation are not conclusive, either upon the parties who may have been interested in opposing it or upon the court itself**, which may order another

settlement, in which errors in the first may be corrected. Fourth. **It is not conclusive in any other court, but is only prima facie evidence, subject to be surcharged and falsified,** and may operate rather as a means of preserving evidence, and the preservation of which executors or other fiduciaries are entitled, than as a judgment; and **being made by officers under the supervision of the court, it ought to have, and has always had, the effect of prima facie evidence, but can always be questioned upon its merits by a bill in chancery.''**

''And in the case of *Stanbury's Admr.* v. *Robinson,* 16 Ky. Law Rep., 310, this court again reviewed this question, referring to the case, supra, and **held that the order approving the report of settlement made by the county judge and ordering it to be recorded, was not a final order.** Said case further held:

'In the case at bar, no formal written exceptions were filed to the report made by the judge to the

''—130a—

''county court of his settlement with appellant, nor was there any contest made in that court as to the validity of the charges complained of, or any judgment rendered passing upon the rights of the parties with reference thereto.'

'The mere formal entry of the order of confirmation of the settlement, no exceptions having been filed thereto, was not a final judgment conclusive of the rights of the parties from which appeal could be taken, and which precludes appellant from bringing his suit to surcharge and correct the alleged errors in the settlement **and to restrain the prosecution of suits for the collection of the balances found to be due by the heirs growing out of such errors.'**

''Since **Patricia O'Brien Smith did not file any exceptions in the Jefferson County Court to the so-called final settlement of the Estate of John A. O'Brien, Deceased,** the laws of Kentucky provide that a fiduciary

may bring an equitable action in the Circuit Court to surcharge the errors in a final settlement of an estate any time within five (5) years from the date the County Court enters an order confirming a settlement with a fiduciary. The so-called settlement of the O'Brien estate was confirmed and approved by the County Court on March 5 and May 1, 1952. This defendant has until May 1, 1957, within which to surcharge and falsify the so-called settlement of the Estate of John A. O'Brien, Deceased.

THE DEFENDANT DENIES THAT THE JOINT ADMINISTRATORS HAVE MADE ANY OVER-PAYMENTS TO HER.

"16. Defendant denies that the Joint administrators of the Estate of John A. O'Brien, Deceased, have made any over-payments to her from the estate of John A. O'Brien, Deceased, of Forty-two Thousand Nine Hundred Sixty-eight Dollars and Twelve Cents ($42,968.12), * * *"

By reading the excerpt from, and Mrs. Smith's Original Answer and Counterclaim, it clearly shows that the material facts were not established by any admissions in her pleadings, or by any judicial proceedings to which she was a party as was contended by the joint administrators on page 13, of their brief, (A. "B", pp. 121a-139a), and that there were genuine issues as to material facts, and that the material facts were not established by any admissions in Mrs. Smith's answer and Counterclaim on any of the Pleadings filed by Mrs. Smith in this Case and under Rule 56 of the Federal Rules of Civil Procedure the District Court should have denied the Joint Administrators' Motion for Summary Judgments.

Nowhere in the nineteen (19) separate proceedings summarized by the Court of Appeals, and referred to in a footnote on page 4 of Respondents Brief, did Mrs. Smith ever file any written exceptions or contest the settlement or any

item of the settlement of the O'Brien Estate. To contest the settlement or any item therein, an exception would have had to be made to specific items in the purported final settlement to form an issue therein for a contest or trial on that item, in County Court.

The commissioner filed his report with the County Court which was **wholly ex parte**, on January 7, 1952, in keeping with KS 1067 now KRS 25.190 and 25.200. (See A. "A", pp 5-7). Mrs. Smith still had time to file exceptions, she even made a Motion for an extension of time in which to file exceptions which was for delay, still attempting to effect the restoration of the Records of the O'Brien Estate which had been lost or stolen, and had not been legally restored because the Joint administrators had refused to. (*Smith* v. *Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479, November 20, 1953).

Since no exceptions were filed by Mrs. Smith to the report and supplemental report of the commissioner, and the award and approval of the County Judge of March 5 and May 1. 1952, was approved and recorded and simply became a ministerial act, and the settlement so made and recorded became prima facie evidence between the parties interested, and under the laws of Kentucky the items of said settlement are subject to be surcharged and falsified within five years. This was done by Mrs. Smith in her First Amended Answer and First Amended Counterclaim with Exhibits "A" to "G", tendered on February 23, 1957, in the office of the Clerk of the District Court, in the within case, (A. "B", pp 165a-330a) before the expiration of five years.

Also, Mrs. Smith filed a bill in Chancery or Complaint, in the Jefferson Circuit Court, Chancery Branch, First Division, No. C. R. 25416, on February 28, 1957, to surcharge and falsify the purported final settlement of the accounts of the Joint administrators before the expiration of five years. This action is still pending in the Jefferson Circuit Court, and an order entered staying the case, until the final determination of the within case.

Thus the District Court took a settlement and a commissioner's report which was recorded as prima facie evidence under KRS 25200 in the O'Brien Estate, called it a final Judgment, before the time had expired to surcharge and falsify said settlement and gave a Summary Judgment against Mrs. Smith **for $73,756.98, in direct violation of the statutes and laws of Kentucky, and if this Writ is denied Mrs. Smith will be deprived of $73,756.98 plus interest without due process of law, in addition to other items and amounts of cash assets.**

8.

The Petitioner's Counterclaim, First Amended Counterclaim and Second Amended Counterclaim.

The Joint administrators did not correctly state what the Petitioner Mrs. Smith charged in her original counterclaim, first amended counterclaim, and second amended counterclaim. Petitioner's original counterclaim charged that, —

> **"the Joint administrators, their officers, agents and attorneys by undue influence, persuasion, threats and coercion induced and procured Patricia O'Brien (Smith) over her objections to acquiese in said sale and conveyance of said partnership interest" * * * "Patricia O'Brien (Smith) did not know at that time that the interest then owned by the Estate of John A. O'Brien in said partnership of Edward J. O'Brien Company was of the aforesaid value of $1,202,035.04 * * * and the pressure, coercion and threats used and exerted, by said Joint administrators and their officers and attorneys to induce Patricia O'Brien (Smith) to acquiese in said sale and conveyance were such acts of which it is inconceivable of anyone acting in a similar fiduciary capacity and similarly situated, desiring to do his duty would, in the exercise of ordinary skill, prudence and diligence, have been guilty." (See paragraphs 8 and 10 of Original Counterclaim, A. "B", pp 137a-138a).**

And that the Joint administrators in making the sale of her partnership interest for only $380,000.00, when the said interest was worth at least $1,202,035.04 had caused the loss of $822,035.04 to Patricia O'Brien-Smith on account of the aforesaid sale and conveyance of her interest in said partnership of Edward J. O'Brien and Co., owned by Mrs. Smith. (See Printed Transcript of Record A. "B", pp 134a-139a).

With the Petitioner's first amended answer and counterclaim, she tendered 7 Exhibits, and with her second amended answer and second amended counterclaim, she tendered therewith 33 Exhibits numbers 42 through 75, which were certified and authenticated, which included and proved conclusively the value of her partnership interest, as she had alleged in her original counterclaim; and that she had been defrauded of over two-thirds of the value of her interest in the partnership of E. J. O'Brien & Company and its four subsidiaries, which was sold by the Joint administrators. (A. "B", pp 224a-330a; A. "C", pp 1706-1989a).

The Respondent Trust Companies would have this Court believe that Mrs. Smith filed her Motion for leave to file her first amended answer and amended counterclaim, after the District Court rendered his opinion and dismissed her original counterclaim. When in truth and fact, the Motion for leave to file the first amendments were filed two and one-half (2½) years before Judge Kent was appointed to hear this case, and four (4) years before the District Court (Judge Kent) ruled thereon. Mrs. Smith filed her Motion For Leave To File Her First Amended Answer and Her First Amended Counterclaim on February 23, 1957, which was tendered therewith and Exhibits A to G, three (3) months after she had filed her original answer and counterclaim on November 12, 1956, (see A. "B", pp 164a-330a).

Judge Kent was not designated to hear this case until in July 1959, and he did not rule on Mrs. Smith's above Motion until April 20, 1961, when he entered an order thereon. (See A. "C", p. 1696a).

The District Court rendered his opinion on March 4, 1961, wherein he dismissed Mrs. Smith's original counterclaim upon the grounds that it was (a) barred by the Kentucky Statutes of Limitations and (b) barred by the rule of res judicata by the Judgment of May 23, 1940, in her rescission suit which was against only the brothers of John A. O'Brien.

9.

We have clearly shown in the Petitioner's Petition for a Writ of Certiorari on pages 187-198, that the issues presented by Mrs. Smith's Original Counterclaim are not barred by the statutes of limitation, and the Court of Appeals did not rule on this issue.

When the so-called Judgment of the County Court of March 5, 1952, was amended on May 1, 1952, the Joint administrators were not discharged and released from liability under their bond. And they are still the Joint administrators of the Estate of John A. O'Brien, and they are still bound by Kentucky law to file a final settlement of the O'Brien Estate in the Jefferson County Court. Thus, the statute of limitation did not begin to run until May 1, 1952, even if the so-called amended Judgment be considered a final settelement. Mrs. Smith would have 15 years from May 1, 1952, or to May 1, 1967, in which to file suit against the Joint administrators on their bond under KRS 413.090, *U.S. Fidelity and Guaranty Co.* v. *Shields*, 157 Ky. 371; 163 S.W. 203, also see KRS 62.060; KRS 25.175; KRS 62.070; KRS 287.220; 44 ALR (2d) pp 808, 809; *Hargis* v. *Sewell's Admr.*, 87 Ky. 63; 7 S.W. 557; 9 Ky. Law Rep. 920; *Kitchen's Ex'rs.* v. *King*, 255 Ky. 235; 73 S.W. 2d 45; *Anspacher* v. *Utterback's Adm'r*, 252 Ky. 666; 68 S.W. 2d 15; *Blackwell et al* v. *Fidelity and Deposit Co.*, 163 Ky. 76; 173 S.W. 321; *Blake* v. *Wolfe*, 105 Ky. 380; 49 S.W. 19; 20 Ky. Law Rep. 1212; *Wren's Ex'r* v. *Wren's Ex'r*, 126 Ky. 704; 104 S.W. 737; 31 Ky. Law Rep. 1096; *Rison et al* v. *Shepherd et al.*, (1945) 299 Ky. 693; 186 S.W. (2d) 648; *Tucker* v. *Aetna Casualty & Surety Co.*, 270 Ky. 723; 110 S.W. (2d) 649; *Schwerman* v. *Commonwealth*, 99 Ky. 296; 38 S.W. 146; 18 Ky. Law Rep. 585; *Grant County Building & Loan &*

Savings Association v. *Lemmon*, 78 S.W. 874; 25 Ky. Law Rep. 1725; *Commonwealth* v. *Sammons*, 180 Ky. 403; 202 S.W. 885.

10.

The Petitioner has clearly shown herein that her original counterclaim filed herein is not barred by the rule of res judicata, by the Judgment of May 23, 1940 in her rescission suit, in which she is fully upheld by the Order and Opinion of Judge E. B. Freed, supra.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals For The Sixth Circuit Did Not Follow Or Apply The Kentucky Law Governing The Final Settlement Of Accounts Of Administrators Of An Estate In Kentucky, In The O'Brien Estate

Petitioner's Petition for Certiorari clearly set out sixteen (16) reasons for granting the writ, and Mrs. Smith has clearly shown that in the twenty-eight (28) years in which the joint administrators have illegally withheld the assets of the estate of John A. O'Brien, in default of their statutory duties, that **she has only filed one lawsuit against the joint administrators** of the O'Brien Estate which was dismissed without prejudice and never went to trial. On the other hand, Mrs. Smith has clearly shown that **the joint administrators have filed three separate settlement suits in the Circuit Court in the O'Brien Estate, numerous appeals and Petitions for rehearing, in the Court of Appeals of Kentucky, in one of which Mrs. Smith was granted a permanent injunction by the Court of Appeals of Kentucky, supra, enjoining the joint administrators from prosecuting a second settlement suit of the Estate**, after they had lost their first settlement suit, in which **the Court of Appeals of Kentucky held that Mrs. Smith's demurrer to the Petition in the first settlement suit, should have been sustained by the Circuit Court, and in effect held that the Writ of Prohibition against the State Court Judge which Mrs. Smith sought, to prevent the trial of the case in the first settlement suit, should have been sustained, which** would have prevented long years of

expensive, harrassing and needless litigation and would have saved the wasting of the assets of the O'Brien Estate, and thousands of dollars which Mrs. Smith has had to pay for out of her own personal funds. Thus, it has been the two Trust Companies the Joint administrators' numerous litigations over Mr. O'Brien's Estate, wherein Mrs. Smith won four decisions from the Court of Appeals of Kentucky against them. From the ruling of the District Court, which was upheld by the United States Court of Appeals for the Sixth Circuit, it appears that neither of the Courts ever saw the correct or complete Printed Transcript of Record of the within case, or ever knew about the Joint administrators' numerous litigations in the O'Brien Estate. The statutes and law of Kentucky governing the final settlement of an estate and the rights of a beneficiary of an estate, cannot be rewritten or ignored, because a beneficiary of an estate has been forced to answer joint administrators' numerous litigations over an estate in which they failed and refused to disclose the nature or value of the O'Brien Estate, and have concealed the value of the said Estate as was so held by three opinions of the Court of Appeals of Kentucky in favor of Mrs. Smith, wherein the joint administrators were seeking the approval of the Court for their sale of Mrs. Smith's partnership interest, and the approval of all their acts and deeds in handling and representing the O'Brien Estate, **yet the Joint administrators have failed and refused four times to draw their complaint to comply with the requirements of Section 429 of the Civil Code of Practice of Kentucky, in order to get the approval in the Circuit Court.**

In stating the true and correct facts, about the Joint administrators numerous litigations over Mr. O'Brien's estate, and wherein the United States Court of Appeals for the Sixth Circuit had no grounds for their findings and rulings, does not violate this Court's Rule 23-4, or any other Rules of this Court. The mere fact that Mrs. Smith, had many days in Court on three trumped-up lawsuits filed by

the joint administrators, which she won, "does not mean that she has had her day in Court," on the merits or validity of the joint administrators' purported final settlement of the accounts of the Estate of John A. O'Brien, in County Court, and we have clearly shown that **"Mrs. Smith has not had her day in Court on the joint administrators' purported final settlement of their accounts of the O'Brien Estate."**

The argument by the joint administrators in this case from the beginning, has been that Mrs. Smith should have appealed within 60 days—appealed from what? There was no trial had in this case in County Court. The purposes of an Appeal in Equity is for a Trial *De Novo—Simmons* v. *Stern*, CCA—N.M. 9 Fed 256-259. The judgments entered herein on March 5, 1952, and amended judgment of May 1, 1952, are wholly *ex-parte* and appear of record in Minute Book No. 116, pp 386-388, in the Jefferson County Court. Since **the ex parte Judgments were for one side only**, and **only the joint administrators and their attorneys were present at the hearings and proceedings in County Court had in the settlement of the O'Brien Estate**, and its approval or confirmation by the County Judge is not conclusive in any other court, these *ex parte* Judgments become only prima facie evidence of the joint administrators' settlement, and can always be questioned on their merits by a bill in Chancery by any party who may be interested in opposing the order or judgment *ex parte*, if done under the Kentucky law within five years from the date of entry. This was done by Mrs. Smith, in the amended counterclaim tendered for filing on February 23, 1957, in this suit filed against Mrs. Smith on September 13, 1956, by the two Trust Companies, and also by Mrs. Smith filing a suit, or her Bill in Chancery in the Jefferson Circuit Court, on February 28, 1957, to surcharge and falsify the joint administrators' purported final settlement of their accounts of the O'Brien Estate; in which an order was entered staying the proceedings in the case until final determination of the within suit. And that Order is still in effect.

If the District Court did not have jurisdiction over probate matters, then how could the District Court have jurisdiction to determine whether the Trust Companies so-called settlements of their accounts of the O'Brien Estate in a County Court was a final settlement, and rule that Mrs. Smith's only remedy was by an appeal within a sixty (60) day period?

The mere fact that the Trust Companies dogmatically label their *ex parte* proceedings a final settlement, definitely does not make this filing of their accounts and disbursements in an *ex parte* proceeding, before a commissioner who awards and fixes fees for attorneys and administrators a final settlement, when the validity of the fees go unquestioned and unchallenged, when Kentucky law and probate procedure provide that they may be challenged. Thus, this cannot be nor does it make a final settlement, when said claims were challenged within the 5 years by Mrs. Smith. Further, name-calling by the Trust Companies does not make a final judgment or final settlement, out of those *ex parte* proceedings, in which the District Court and the Court of Appeals erroneously **misconstrued** and upheld as a final settlement, when it is only an administrative *ex parte* proceeding. (See District Court's Opinion and Mrs. Smith's Petition for Rehearing, Transcript of Record A. "C", pp 1607-1691a; also see Appendix E. and F. herein and Court of Appeals Opinion and Mrs. Smith's Petition for Rehearing A. "D", pp. 2368a-2575a),

The Trust Companies contradict themselves on pages 8 and 9, of their brief, where they contended in one breath that the District Court, did not approve the purported final settlements of the accounts of the joint administrators of the O'Brien Estate, which they contend was made by the Jefferson County Court by its March 5, 1952 Judgment, and amended Judgment of May 1, 1952, and in the next breath, in speaking of the District Court's ruling, the joint administrators say that the District Court held and approved the amount of attorneys fees and the joint administrators' fees of $73,768.98, which had been awarded to them by the

Jefferson County Court, when neither Mrs. Smith or her counsel, were present, to except and introduce proof that they were not legally entitled to any fees at all.

When the District Court ruled that the purported final settlement of the accounts of the O'Brien Estate was a final settlement, he definitely took Jurisdiction over a Probate matter. In the District Court's decision therein by his ruling which the Court of Appeals upheld, they decided an important question of Kentucky Law in conflict with applicable Kentucky Law and Kentucky Statutes; as we have clearly shown, they did not apply the Kentucky Law or Kentucky Revised Statutes governing the final settlement of accounts of administrators of an estate in Kentucky, and completely misconstrued the following Kentucky cases: *Scott's Heirs* v. *Kennedy's Ex'r.*, 12 B.Mon. 510; 51 Ky. 510-517. 4 KLR 712 (1849); *Stanberry's Adm'r* v. *Robinson,* 16 Ky. Law Rep. 310; *Harper* v. *Lamb, Ballantine et al.* v. *Harper et al.*, 202 Ky. 771, 261 S.W. 280-282 (Court of Appeals of Ky. April 25, 1924); *Frazier* v. *Kavanaugh Adm'r,* 4 Ky. Law Rep. 712; Article 5, Chapter 35 Kentucky Statutes.

By the above cited cases, it clearly shows that both the District Court and the Court of Appeals decisions were in conflict with the applicable Kentucky Law, and they did not follow or apply, the Kentucky Law in ruling that Mrs. Smith cannot now be permitted to surcharge and falsify the purported final settlement of the joint administrators' accounts of the O'Brien Estate.

The joint administrators state that the District Court ruled that it was a final settlement and that the Court of Appeals in affirming also held that the County Court settlement was a final settlement and they state that Mrs. Smith made it a final settlement, but they do not correctly state what steps Mrs. Smith took after the settlement was filed. Mrs. Smith did not try to prevent the joint administrators from filing a settlement. Mrs. Smith only objected to the joint administrators having expensive hearings before a commissioner in County Court on the purported final settle-

ment of the accounts for four reasons, (1) while the joint administrators' second trumped-up settlement suit of the O'Brien Estate was pending in the Court of Appeals of Kentucky, (2) Mrs. Smith's injunction suit to enjoin the joint administrators from prosecuting their second trumped-up settlement suit of the O'Brien Estate in Jefferson Circuit Court, was pending in the Court of Appeals of Kentucky, and (3) the Appeal filed by the joint administrators in the Jefferson Circuit Court on May 26, 1949, from the "Rule Issued" against the joint administrators and the Order thereon, by Judge Horace M. Barker, Judge of the Jefferson County Court, to file a final settlement of the O'Brien Estate on June 2, 1949, and the injunction and supersedeas issued against Judge Barker in the County Court, by the joint administrators, issued on May 26, 1949 and executed on June 2, 1949, to stay all proceedings in the County Court in the final settlement of the O'Brien Estate, was still pending, even though a new Judge had been elected and took office in 1950, (Judge Shamburger) and (4) all of the Original Records in the Estate of John A. O'Brien were still missing and had not been returned or legally restored, which were taken from the office of the Clerk of the Jefferson County Court to the Jefferson Circuit Court, when the joint administrators filed their Appeal in the Circuit Court on May 26, 1949, from the Rule Issued against them and the Order thereon by Judge Horace M. Barker, Judge of the County Court, and had a supersedeas issued and served on Judge Barker, to stay all proceedings in the Estate of John A. O'Brien; and the records were not legally restored until October 1954, almost a year after the Court of Appeals ordered and directed the joint administrators to legally restore the records in the O'Brien Estate, in which Mrs. Smith was fully upheld in the opinion of *Smith* v. *Shamburger, Judge,* 314 Ky. 850; 238 S.W. 2d 844, January 26, 1951, even though the injunction against Shamburger was denied.

How could the true facts in regards to the steps taken by Mrs. Smith as above stated, be construed that Mrs. Smith

was "contesting, resisting, objecting to or challenging the accounts which made the settlement become final," as held by the two Courts. None of the Kentucky Law Citations cited in the joint administrators' brief on pages 9, 10 and 11 thereof, which they quoted from the District Court's opinion and the Court of Appeals' opinion uphold any such construction, as those two Courts put upon them, when the opinion of the Court of Appeals of Kentucky in the case of *Smith* v. *Shamburger*, supra, upheld Mrs. Smith in her above stated contentions, where they stated therein as follows:

> **(7) "In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court; (1) A settlement suit filed (March 31, 1949) (and the Petition For An Injunction filed on) April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1946(9). The appeal is from an order of Hon. Horace M. Barker, former judge of Jefferson County Court, directing the Co-administrators to settle the estate. There has been no final disposition of either of these cases." * * * "If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement." (Also see Writ of Certiorari, pp 112-121).**

The opinion in effect held that the settlement could not be a final settlement until those two cases and the joint administrators' Appeal from the Rule Issued against them were ruled on, and even though they stated that Mrs. Smith would have a remedy by another appeal from the County Court's ruling, they did not rule that she could not wait five years as provided by the Kentucky law and Statutes, and file a suit to surcharge and falsify the purported final settlement which she elected to do, since there are two ways provided to challenge the final settlements of the accounts

of an administrator in Kentucky as has already been set out herein.

There has been a successful effort to mis-lead the Courts into believing that Mrs. Smith had only one course to follow after the Trust Company lawyers had their *ex parte* proceedings in fixing their fees, and that she should have appealed. We have shown that is not true and that Mrs. Smith had a legal right to surcharge and falsify the settlement within five (5) years.

Administrators in making final settlements in Kentucky before 1942 under *KS Section 1067* would file same with the County Court Clerk then the settlement would lay over one term (30 days) for exceptions; if no exceptions were filed at the succeeding term of Court then the settlement would be recorded and become prima facie evidence between the parties, but could be surcharged and falsified within 5 years.

Since 1942 under *KRS 25.200(1067)* administrators in making final settlements file same with the County Court Clerk and the settlement lays over "not less than 10 days or until the first day of the next term of Court during which, or at which exceptions may be filed by any person interested. If no exceptions are filed the report * * * shall be approved and recorded * * * settlements so made and recorded shall be prima facie evidence between the parties interested," and can be surcharged and falsified within 5 years.

This so-called final settlement was filed with the County Court Clerk and laid over after the *ex parte* proceeding, then was the time for Mrs. Smith to file her exceptions or wait and surcharge and falsify the settlement for fraud, mistakes or invalid claims, within five (5) years.

The District Court and the Court of Appeals evidently failed to read the Kentucky Statutes and the Kentucky Decisions relating to the settlement of estates in Kentucky.

All the appearances made by Mrs. Smith were in the preliminary proceedings. All the motions and pleadings filed by her were for delaying purposes seeking the restoration of records which were stolen or lost by the actions of the attorneys for the administrators.

Since Mrs. Smith did not file any written exceptions to test the validity or the merits of the claims filed and approved by the County Court, she had a further course which was open and **that was not by appeal,** as the Trust Companies insist, **but by surcharging** and **falsifying** the respective claims approved by the County Court, and under Kentucky Law she had within five (5) years from March 5 and May 1, 1952, to wit until May 1, 1957 to so do, and she did, as we have clearly shown herein.

II. The Court Of Appeals For The Sixth Circuit Did Not Follow Or Apply The Kentucky Statutes Or The Kentucky Revised Statutes Governing The Final Settlement Of Accounts Of Adminisrators Of An Estate, Or The Administration Of An Estate In Kentucky, In The O'Brien Estate In Which The Joint Administrators Violated More Than Nine (9) Kentucky Statutes

The District Court and the Court of Appeals, failed to follow or apply the Kentucky revised Statutes governing the final settlements of Estates in Kentucky in the O'Brien Estate and the Kentucky Revised Statutes which the Trust Companies violated in representing the O'Brien Estate, and what it cost Mrs. Smith thereby, are as follows:

1. *Under KS 3858 now KRS 25.175,* the joint administrators violated this statute by not filing a final settlement of the O'Brien Estate in the Jefferson County Court on March 1, 1936, two years after their appointment.

It cost Mrs. Smith thousands of dollars to defend the two trumped-up settlement suits in the O'Brien Estate filed and prosecuted by the joint administrators in the Jefferson Cir-

cuit Court, **on petitions and amended petitions which were filed by them, which did not comply with Section 429 of the Civil Code of Practice of Kentucky, as held by two opinions from the Court of Appeals of Kentucky in two lawsuits which Mrs. Smith won against them,** after eleven years and fourteen years of litigations in the Courts of Kentucky.

2. *Under KRS 25.170 (1062; 1065),* the joint administrators owe ten dollars per day from March 1, 1936, until June 21, 1950, when they filed their first purported final settlements of their accounts of the O'Brien Estate in the Jefferson County Court which amounts to 5,227 days that they were delinquent in filing their first partial settlement of the O'Brien estate in County Court, at ten dollars ($10.00) per day, which equals a total amount of fifty-two thousand two hundred seventy dollars ($52,270.00) that the joint administrators owe for violating this Statute. This Statute specifically states that;

> **"any fiduciary failing without good cause therefor, when so notified to settle his accounts, shall be fined by the judge, for each day he so fails or refuses after notice, ten dollars, to be collected by rule or other process;"**

Now **both of the joint administrators were notified and ordered three times by three different Courts to file a final settlement of the O'Brien estate in County Court, and that they were delinquent in the filing thereof.** (1) The joint administrators were notified by Judge Mark Beauchamp, Judge of the Jefferson County Court on January 21, 1939, that **"under the Provisions of the Law that their settlement of the O'Brien Estate was due to be filed in County Court on March 1, 1936 and to file it immediately."** They were three years in default of their statutory duty then, but **they still defied the order of the Court and refused to file a settlement of their accounts.** See letter of Judge Mark Beauchamp, County Judge, to the joint administrators dated January 21, 1939, which is as follows:

"No. 24146 January 21, 1939

JEFFERSON COUNTY COURT
MARK BEAUCHAMP, COUNTY JUDGE

"The Louisville Trust Company, and
Citizens Fidelity Bank & Trust Company,
5th and Market Sts.,
Louisville, Ky.

"Dear Sirs:—

"On March 1st, 1934, You Were Appointed Co-Executors of the Estate of John A. O'Brien, Deceased, In The Jefferson County Court. Under the Provisions of the Law Your Settlement Was Due March 1st, 1936.

"Please Take Up This Matter At Once With Any Of The Following Commissioners."

"The Judge listed six commissioners, their addresses and telephone numbers.)"

/s/ MARK BEAUCHAMP
Judge of Jefferson County Court"

(See Writ of Certiorari, pp 89-90.) (2) After the first opinion was rendered in the Court of Appeals of Kentucky and the rehearing was denied in 1948, wherein **the Court of Appeals ordered and directed the joint administrators to file a final settlement of the O'Brien Estate in County Court,** in the case of *Smith* v. *The Louisville Trust Company and Citizens Fidelity Bank & Trust Company*, 308 Ky. 189; 213 S.W. (2d) 987 (June 8, 1948) Rehearing denied Oct. 29, 1948. (3) Then on February 24, 1949, Mrs. Smith filed a "Motion For Rule Against The Joint Administrators To File A Final Settlement Of Their Accounts Of The OBrien Estate, in County Court," in compliance with the opinion of the Court of Appeals of Kentucky, supra. The said motion was granted and **order entered on Februray 24, 1949, that a Rule Issued against the said joint administrators to settle the accounts of the Estate of John A. O'Brien on or before March 1, 1949.** (A. "B", pp. 713a-717a). **The joint administrators still**

refused to file the final settlement of the O'Brien Estate in County Court, and did not file even a partial settlement of the Estate until June 21, 1950.

3. *KRS 25.190*—The joint administrators violated this statute by contending that their purported final settlement of their accounts of the O'Brien Estate made and recorded in the County Court in January 1952, was not prima facie evidence between the parties interested, as this statute holds.

4. *KRS 25.200*—The joint administrators violated this statute, by contending that Mrs. Smith was not entitled to file exceptions to their purported final settlement of their accounts of the O'Brien Estate which was prima facie evidence between the parties interested.

5. KRS 64.260 (396; 401; 407; 408; 1740) states that, "Commissioners and receivers. (1) The fees of court commissioners and receivers for the following services shall be as follows:

> **"To a commissioner for alloting dower, dividing land or settling accounts, per day ..... $1.50"**

As shown, this statute provides that one dollar and fifty cents ($1.50) will be allowed per day for the service of a special commissioner to have hearings in the County Cour of Kentucky on administrators' *ex parte* proceedings on their final settlements of estates. The joint administrators violated this statute when on March 4, 1952, they paid to A. Scott Hamilton, $2,000.00, the commissioner who made and approved the joint administrators' purported final settlement of the accounts of the O'Brien Estate (who committed suicide shortly there after), for services rendered for the joint administrators' hearings held in the Jefferson County Court in their *ex parte* proceedings on their purported final settlement of the O'Brien Estate in County Court for six (6) days on July 12, December 17, 18, 19, 28, 1951, and January 2, 1952. Thus the commissioner was paid three hundred thirty three dollars

and thirty three cents ($333.33) per day for six days, when under this statute he was only entitled to one dollar and fifty cents ($1.50) per day, a total of nine ($9.00) dollars, for his services rendered to the O'Brien Estate, resulting in a loss to Mrs. Smith of one thousand six hundred sixty six dollars and sixty seven cents ($1,666.67).

6. *KRS 395.255* states that, **"If a fiduciary neglects or refuses to file an inventory or account when due according to law, or when ordered by the court, the court shall notify the fiduciary of his delinquency and fix a date when such inventory or account must be filed." * * * "If the fiduciary fails to file such account within thirty days after the date fixed in said notice, no allowance shall be made for his services."**

The joint administrators violated this statute, when they failed and refused to file an inventory or a settlement of their accounts of the O'Brien Estate when it was due according to law on March 1, 1956, and when they were ordered to do so by Judge Mark Beauchamp of the Jefferson County Court on January 21, 1939, by the Court of Appeals of Kentucky on October 29, 1948, and by Judge Horace M. Barker, Judge of the Jefferson County Court on February 24, 1949, and under this statute they should have been removed for being delinquent; and after the joint administrators failure to file their final settlements of the accounts of the O'Brien Estate within thirty days after the date fixed in the first notice, no allowance should be made for any joint administrators' fees or attorneys' fees in the estate of John A. O'Brien after January 21, 1939. Therefore, the joint administrators are not entitled to any fees or fees for their attorneys and their Judgments obtained in County Court and approved by the District Court and the Court of Appeals for the Sixth Circuit, said Judgments were obtained by fraud and should have been set aside by the District Court who took jurisdiction of this probate matter as we have clearly shown, and we are supported in our contentions by the cases of, *Griffith* v. *Bank of New York*, 147 Fed. (2d) 899, Febru-

ary 16, 1945; *Rogers* v. *Girard Trust Co.*, 159 F. 2d 239, (1947); and *Meredith* v. *City of Winter Haven*, 320 U.S. 228; 64 S.Ct. 7, at page 11, (1943). (See Writ of Certiorari, pp 157-171.)

7. *KRS 395.310* states that, "**A personal representative, after the expiration of two years from the time he qualifies, shall be charged with interest on the surplus assets in his hands from that period, and before the expiration of two years shall be charged with all interest realized on assets.**" The joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $25,000.00 cash belonging to Mrs. Smith which they held in their banks from February 11, 1936 to June 28, 1946, which amounts to.....$20,779.38
The joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $40,000.00 cash belonging to Mrs. Smith which they held in their banks from June 28, 1946 to November 9, 1962, which amounts to $63,852.57
cash which they still have in their possession as well as the cash in the amount of $40,000.00. The interest alone to November 9, 1962, amounts to .....$84,631.95.

(See Writ of Certiorari, pp 182-184, and pp 199-201).

8. *KRS 446.070* (466) states that, "**A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.**"

Under this statute Mrs. Smith is entitled to recover from the joint administrators of the O'Brien estate all the costs for attorneys fees, printed records, and printed briefs, in defending the two trumped-up settlement suits which the joint administrators filed in the Jefferson Circuit Court, and **prosecuted from February 1937, through April 17, 1951, in both cases of which the Court of Appeals**

of Kentucky held were filed and prosecuted on defective petitions and amended petitions which did not comply with Section 429 of the Civil Code of Practice of Kentucky, because the joint administrators wanted to conceal and refused to disclose "the nature and value of the property, real and personal, of the decedent, (John A. O'Brien) so far as known to the plaintiffs." (Trust Companies) and **the joint administrators did not and would not comply with Section 429 of the Civil Code of Practice of Kentucky**, as required by that statute, in order for them to get the approval of their sale of the partnership interest owned by Mrs. Smith, in the Edward J. O'Brien & Company and its four subsidiaries, and in order for them to get the approval of the Circuit Court of all their acts and transactions pertaining to the administration of the Estate of John A. O'Brien.

Surely this Court will not believe that the two law firms of Bullitt, Dawson and Tarrant, and Davis, Boehl, Viser and Marcus, did not know how, and could not find out how to comply with **Section 429 of the Civil Code of Practice of Kentucky from February 1937 to April 17, 1951**, during the years they refused to file a final settlement of the accounts of the Trust Companies of the O'Brien Estate, and kept the O'Brien Estate in constant litigation, for which they were awarded $73,768.98.

9. KRS 413.090 (2514) provides: "Action upon Judgment, Written Contract or Bond; Fifteen Year Limitation.—

"(3) **An action upon the official bond of a sheriff, marshall, clerk, constable or any other public officer, or any commissioner, receiver, curator, personal representative, guardian, committee, or trustee appointed by a court or authority of law.**"

This statute provides that an action on the Bond of the joint administrators, shall commence within fifteen years after the cause of action first accrued, and Mrs. Smith's cause of action against the joint administrators in the Estate of John A. O'Brien could have been filed under

this statute as late as 1965, because the joint administrators did not file their purported final settlement of the O'Brien estate until on June 21, 1950, which was confirmed and the Judgment was entered on March 5, 1952 and amended on May 1, 1952, under which the joint administrators were not released from their Bonds, and are still under their Bonds, as joint administrators of the O'Brien Estate, therefore Mrs. Smith's original Counterclaim filed on November 12, 1956, was not barred by the Statute of limitations.

The acts and conduct of the joint administrators in employing attorneys to aid and assist them in evading and violating all the Kentucky statutes governing the final settlements of their accounts in the O'Brien Estate, and the statutory duties of the joint administrators as aforesaid, were unconscionable and fraudulent, and the allowance or payment of any administrators' fees, or attorneys' fees out of the O'Brien estate is, and would be inequitable, fraudulent, illegal and unjust, and should be disallowed.

Thus, it is clearly proven that the joint administrators have violated nine Kentucky Statutes governing the administration of, and the final settlement of their accounts of the Estate of John A. O'Brien, and that the District Court and the Court of Appeals did not follow or apply the Kentucky Revised Statutes governing the Administration of and the final settlement of the O'Brien Estate, and they decided important questions of Kentucky Statutes in conflict with the statutes of Kentucky, and have decided important State questions in a way in conflict with applicable State law and State Statutes.

III. The Rulings Of The District Court, Which Were Upheld By The Court Of Appeals For The Sixth Circuit, Violated Rule 15, Of The Federal Rules Of Civil Procedure In Not Permitting Mrs. Smith To File Any Amendments To Her Original Answer Or Her Original Counterclaim

The Petitioner Mrs. Smith was denied the right to file a single amendment either to her original answer, or her original counterclaim, which she tendered, and sought to file under Rule 15 of the Federal Rules of Civil Procedure. By those amendments she sought to *surcharge* and *falsify* the joint administrators' purported final settlement of their accounts of the O'Brien Estate, and she tendered with the amendments, audits, appraisals, contracts and other exhibits, which were all certified and authenticated documents, which proved all her claims and the additional cash values she was entitled to from the O'Brien Estate which she inherited. Her claims were not barred either by Kentucky limitations Statutes or under the Rule of res judicata, as we have clearly shown in the Petition for Writ of Certiorari pages 187-198; and pages 129-138. A mere reading of the amendments, and the exhibits tendered therewith, clearly show that the allegations asserted in the amendments are meritorious claims, and that denial of leave to file her amended answers and her amended counterclaims sanctioned a radical departure from accepted standards of Judicial procedure, in the settlement of estates in Kentucky.

If time did not bar the joint administrators from filing a complaint in the within suit in 1956, in which they raised the issue, and sought the approval of the Courts for their sale of Mrs. O'Brien-Smith's partnership interest in E. J. O'Brien & Company and its four subsidiaries, in violation of the terms of the partnership agreement, and for less than one-third of its value, **then time cannot legally bar Mrs. O'Brien-Smith from introducing proof in a trial on the material facts which were put in issue, when she denied and controverted the allegations set forth in the**

joint administrators' Complaint, as proven herein. (See Petition for Writ of Certiorari, pp 191-198). Further, this case involves far more than the issue of the sale of Mrs. Smith's partnership interest in Edward J. O'Brien & Company and its four subsidiaries, as we have clearly shown and proven.

IV. The Decision Of The Court Of Appeals For The Sixth Circuit, Is In Conflict With The Second Circuit Court Of Appeals, The Seventh Circuit Court Of Appeals, Their Own Sixth Circuit, And With This Court's Ruling

The decision of the Sixth Circuit Court of Appeals is in conflict with the decision of the Second Circuit Court of Appeals, the Seventh Circuit Court of Appeals and their own, the Sixth Circuit Court of Appeals, and with this Court's ruling wherein this Court granted a Petition for a Writ of Certiorari in the case of *W. J. Meredith et al.* v. *City of Winter Haven*, 320 U.S. 228-238 (1943).

1. In the case of *Griffith* v. *Bank of New York*, 147 F. (2d) 899, Circuit Court of Appeals, Second Circuit, (1945).

That was a suit by residuary legatee against testamentary trustee for damages for breach of duty as trustee and duress, and the Court ruled that the action could be maintained in Federal Court, even though a Judgment of the State Court had been entered settling the Trustee's account, and the Petition had been dismissed for reasons not going to the merits and the Court of Appeals reversed and remanded the case, and held that:

> "we cannot agree with the District Court's further conclusion that a judgment cannot be attacked collaterally, and that parties seeking relief from it must do so in the original action. For it is well settled that the federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court judgment obtained by fraud."

In that case even though an agreed judgment had been filed and entered the Court of Appeals held that the Dis-

trict Court should have taken jurisdiction for the legatee's suit for damages against the trustee.

As there so here in the instant case the District Court should have taken jurisdiction of Mrs. Smith's Amended Counterclaims, when there had not even been a judgment rendered in the within case, because a County Judge in Kentucky cannot legally render an in personnam judgment.

In the case of *Paul et al.* v. *Girard Trust Co.*, 124 F. 2d 809 (1941). Circuit Court of Appeals, Seventh Circuit. That was a suit by beneficiaries against the Girard Trust Company individually and as Trustee, to surcharge the trustee for loss on investments under the laws of the State retained by trustee and for interest thereon.

The Court of Appeals held: "that the trustee was not authorized by the trust agreement to retain non-legal securities: that plaintiffs are not estopped to bring this action; and that the surcharge was in all respects properly computed."

As there, so here, Mrs. Smith should have been granted the right in the Federal District Court to surcharge the Two Trust Companies, for all losses sustained by her, under the laws of Kentucky which she sought to do by the filing of a "Motion For Leave To File Her First Amended Answer and Her First Amended Counterclaim," with Exhibits "A to G," which were all tendered therewith on February 23, 1957, which was three months after she filed her Original Answer and her Original Counterclaim on November 12, 1956. The District Court did not rule on the said motion for four years, until on May 4, 1961, he overruled the said Motion and the Court of Appeals for the Sixth Circuit upheld his ruling, that the denial was because the District could not take jurisdiction of a Probate Matter.

In the case of *Rogers* v. *Girard Trust Company*, 159 F. 2d 239 (1947) from Circuit Court of Appeals, Sixth Circuit.

The Court of Appeals for the Sixth Circuit, reverses itself by the ruling in the within case.

In the case above cited it was a suit by the beneficiary of an estate against a trustee wherein the complaint alleged numerous breaches of trust, and it was an action for money damages in Ohio against the Trust Company a resident of Pennsylvania. The trustee filed its account of administration of the trust of the estate, with the Orphans Court of Philadelphia County, Pennsylvania. The petition filed with the account, contained an application for distribution of one-half of the corpus of the trust.

The beneficiary protested against the distribution in a letter addressed to the trustee but took no steps to intervene in the proceedings. The account was confirmed absolutely and the distribution ordered.

Several months later the beneficiary filed a petition in the Federal Court in Ohio, charging the Trust Company with negligence and with deliberate and willful acts of malfeasance claiming damages for various specific mismanagements of estate property and breaches of trust, etc.

No answer was filed by the Trust Company but they moved to dismiss the complaint on the ground that the Orphans Court had already assumed jurisdiction of the subject matter. Before the Court had ruled upon this Motion, The Trust Company moved for Summary Judgment, on the ground that no genuine issue existed as to any material fact, and that it was entitled to a Judgment as Matter of law. The Trust Company later withdrew its motion to dismiss and the beneficiary moved for leave to file an amended complaint, as there so here in the instant case.

The District Court denied the Motion for leave to file the amended complaint, and sustained the Trust Companies Motion for Summary Judgment.

No finding of fact or conclusions of law were made by the District Court.

The beneficiary contended that the District Court erred in refusing permission to file the amended complaint and in granting the Trust Companies Summary Judgment.

The Court of Appeals for the Sixth Circuit in that case sustained the beneficiaries contentions and held that "it was error for the District Court to deny the leave to amend and further that "it was also error to grant the Trust Companies Motion For Summary Judgment Reversed the Judgment of the District Court and remanded the case to the District Court. In the case of *Meredith* v. *City of Winter Haven,* 320 U.S. 227-235 (1943).

That was a case on Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of the District Court of the United States for the Southern District of Florida. This Court held in that case that:

> "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."
>
> "We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of an exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."
>
> "Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 ALR 1487, supra, did not free the federal courts from the duty of deciding questions of

state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. Wichita Royalty Co. v. City Nat. Bank, 306 U.S. 103, 83 L. ed. 515, 59 S. Ct. 420, supra; West v. American Teleph. & Teleg. Co. supra (311 U.S. 236, 237, 85 L. ed. 143, 144, 61 S. Ct. 179, 132 ALR 956); Fidelity Union Trust Co. v. Field, supra (311 U.S.) 177-180, 85 L. ed. 112-114, 61 S. Ct. 176; Six cos. of Cal. v. Joint Highway Dist. 311 U.S. 180, 188, 85 L. ed. 114, 117, 61 S. Ct. 186; Stoner v. New York L. Ins. Co. 311 U.S. 464, 85 L. ed. 284, 61 S. Ct. 336; Palmer v. Hoffman, 318 U.S. 109, 116-118, 87 L. ed. 645, 651, 652, 63 S. Ct. 477, 144 ALR 719. Even though our decision could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication."

"The judgment will be reversed and the cause remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

Reversed."

As in that Case, so in the instant case, Mrs. Smith, the Petitioner's case being within the jurisdiction conferred on the federal courts by Congress, was entitled to have such an adjudication of her tendered Amended Answer and Amended Counterclaim and under Rule 19 of the Rules of this Court, the Petition for a Writ of Certiorari should have been granted.

V. The Petitioner, Mrs. Smith, Was Denied Due Process Of Law Guaranteed By The Fourteenth Amendment To The Constitution Of The United States, When She Was Denied The Right Of A Trial In This Suit Filed Against Her On September 13, 1956

The Complaint in this case was filed by the joint administrators, on September 13, 1956, (consisting of 28 printed pages) against Patricia O'Brien-Smith, four years, and four and one-half months after the so-called Judgment of the Jefferson County Court was entered on March 5, 1952, and amended on May 1, 1952, in the O'Brien Estate, and in their Complaint the joint administrators raised the issue of the sale of Mrs. Smith's partnership interest in E. J. O'Brien & Company and its four subsidiaries, and made many misstatements of facts and figures in regards thereto, which Mrs. Smith denied and controverted which she had a legal right to do. Now Exhibit No. 1, to the Trust Companies' Complaint, was their pleading entitled "Their Account and Final Settlement of the Execution of Their Trust", (which consisted of 39 printed pages); it was made a part of the Complaint, just as much as if it had been written in it, making a total of 67 pages, which one of the joint administrators, **The Louisville Trust Company refused to sign or swear to** (A. "B", p 93a).

In the prayer of the Trust Companies' pleading under paragraph IV, they prayed that:

> 'IV. All of the questions and controversies herein, and all of the Administrators' rights and claims, and all rights and claims, if any, in respect of all of the questions and controversies and all other matters pertaining to the Estate, be finally judicially settled, determined and adjudged; and especially it be determined and adjudged that Patricia R. Smith is forever estopped against, and forever barred from, making any further claim against the Administrators (in either their individual capacities or in their capacity as Joint Administrators) for or on account of the

sale of Mr. O'Brien's Partnership Interest in E. J. O'Brien & Co. by the Compromise Settlement Agreement of November 5-15, 1935, or for or on account of their action in approving that Agreement and their acts and transactions in performance of the terms thereof." (See A. "B", pp 91a-92a).

Thus the joint administrators sought the approval of all of their acts and deeds in the entire administration of the O'Brien Estate.

In their Complaint, the joint administrators (1) made misstatements of facts and figures pertaining to the sale of Mrs. Smith's partnership interest in the E. J. O'Brien and Company and its four subsidiaries, which was made by them in 1935 (2) **they made many misstatements of facts pertaining to their numerous litigations which they filed and prosecuted on petitions and amended petitions which the Court of Appeals of Kentucky held did not state a cause of action because they did not comply with Section 429 of the Civil Code of Practice of Kentucky, for the final settlement of the O'Brien Estate in the Jefferson Circuit Court**; (3) **they made many misstatements of facts under the heading of "administrators' payments to Mrs. O'Brien now Smith, from Mr. O'Brien's Estate"**, which Mrs. Smith denied and controverted, and is legally entitled to a trial thereon, whether she is granted the right to surcharge and falsify the purported final settlements of accounts or not; (4) **the Joint administrators made many misstatements of facts and figures under the headings of Administrators' Receipts and Disbursements of Mr. O'Brien's Estate.** Under disbursements they deliberately made a misstatement of fact when they contended that the "difference between appraised value (of $452,418.73) and sale price ($418,000.00) of Mr. O'Brien's Partnership Interest in E. J. O'Brien & Company equalled $34,418.73, and they called that a disbursement"—Disbursement to who?

In the answer of Mrs. Smith to the Complaint, she denied that an appraisal was ever made of the partner-

ship interest or that the $34,418.73 was a disbursement to anyone, or that she had ever been informed about any such disbursement and that she is entitled to know whom it was paid to, and to require the Trust Companies to introduce proof in a trial thereon. (A. "B", p 39a).

In the answer and counterclaim filed by Mrs. Smith on November 12, 1956, all of the material facts as set forth in the Complaint, and the Joint administrators' purported final settlement of their accounts which they labeled as their Exhibit No. 1, to their Complaint, were denied and controverted by Mrs. Smith, and there were not any admissions in her pleadings which established the material facts. Mrs. Smith specifically made twenty-four (24) denials of so-called salient facts alleged in the Complaint of the Trust Companies, but more than that in the thirty-sixth paragraph of her Answer and Counterclaim she denied, "every other allegation of the Complaint wherein affirmative relief is sought against this defendant (petitioner)". (See Printed Transcript of Record A. "B", p 133a). When the Trust Companies stated that Mrs. Smith admitted any material allegations against her it is a blatant misrepresentation of the truth. (See the following pleadings filed for Mrs. Smith.

(1) "Answer and Counterclaim of Defendant, Patricia O'Brien-Smith with Jury Demand", filed on November 12, 1956, (A. "B", pp 121a-139a).

(2) "Defendant's (Mrs. Smith's) Motion (Filed) For Leave To File An Amended Answer and An Amended Counterclaim, Surcharging The Joint Administrators' Settlements—and On Bond Of The Estate Of John A. O'Brien, Deceased, With Exhibits "A" to "G", filed February 23, 1957, (A. "B", pp 164a-165a).

(3) "Defendant Patricia R. Smith's Amended Answer and Amended Counterclaim, Surcharging Joint Administrators' Settlements—And On Bond Of The Estate of John A. O'Brien, Deceased, With Six (6) Exhibits, "A", "B", "C", "D", "E", "F", and "G", Tendered February 23, 1957, (A. "B", pp 165a-224a).

(4) "Affidavit of Patricia O'Brien-Smith Filed in Opposition to 'Plaintiffs' Joint Administrators' Motion for Summary Judgment', and Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's Counterclaim", filed March 21, 1957, (A. "B", pp 342a-388a).

(5) "Defendant Patricia R. Smith's Reply to 'Administrators' Objections to Mrs. O'Brien-Smith's Motion for Leave to File Amended Answer and Amended Counterclaim,' Filed by Counsel for Defendant, Patricia R. Smith", filed on May 3, 1957, (A. "B", pp 413a-429a).

(6) "Defendant Patricia R. Smith's Reply to the 'Administrators' Motion to Strike Mrs. O'Brien-Smith's Affidavit (filed March 21, 1957) in Opposition to Administrators' Motion for Summary Judgment.' Tendered on August 16, 1959 (by mailing to Judge W. Wallace Kent by Registered Mail, Return Receipt Requested on August 15, 1959). Record of Case Not Returned to Clerk of the U.S. District Court in Louisville Until June 9, 1961," and filed as of June 9, 1961, (A. "B", pp 451a-471a).

(7) "Defendant's Supplemental Affidavit of Patricia O'Brien-Smith in Opposition to 'Plaintiffs' Joint Administrators' Motion for a Summary Judgment' and Second Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim, Filed Herein on November 12, 1956, Tendered on August 27, 1959, with Thirty-five (35) Exhibits Attached Thereto", Filed Pursuant to Order dated August 28, 1959, (A. "B", pp 472a-1279a).

(8) "Defendant, Patricia O'Brien-Smith's (1) Objections To The Joint Administrators' Motion For Leave To File An Amended Reply; (2) Objections To The Joint Administrators' Amended Reply To Mrs. O'Brien-Smith's Counterclaim; and (3) Objections To The Joint Administrators' Amended Motion For a Summary Judgment To Dismiss Mrs. Smith's (First) Counterclaim," and attached thereto was, Defendant's Exhibits Nos. 36, 37, 38 and 39. Filed September 18, 1959, (A. "C", pp 1549a-1572a).

(9) "Defendant Mrs. O'Brien-Smith's Supplemental Reply to Rebuttal Argument of Joint Administrators'

on August 27, 1959, Pages 61 to 80 of Transcript of Hearings on Motions with Exhibits No. 40 and 41, "filed on October 2, 1959, (A. "C", pp 1573a-1600a).

(10) "Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer and Her Second Amended Counterclaim, and Exhibits Numbers 42 through 75" (all of which was tendered therewith), filed on May 15, 1961, (A. "C", pp 1703a-1989a).

Mrs. Smith denies that there were any "records of any Judicial proceedings to which Mrs. Smith was a party", filed in this case, wherein Mrs. Smith admitted any of the material facts set out in the joint administrators Complaint or their settlement of accounts labeled Exhibit No. 1, thereto, or any other Exhibits filed by Mrs. Smith, or the joint administrators in this case; and the joint administrators have again deliberately misstated the facts to this Court, in their footnote or page 13 of their brief. As has already been stated in this Petition, **there was not any Transcript of Testimony of any proceedings from the Rescission suit in the O'Brien Estate, or from the joint administrators' two settlement suits filed in the O'Brien Estate, or their hearings in County Court in 1951 and 1952, on their purported final settlement of the O'Brien Estate, or from any other Court, filed in the within case, and there are not any shown on the Certified Copies of the Docket Entries from the District Court or the Court of Appeals, from which the entire and complete Transcript of Record was printed in this case, consisting of 2,625 pages in three volumes,** filed in this Court with Mrs. Smith's Petition for Writ of Certiorari, on January 16, 1965, to which the joint administrators have made all of their Transcript of Record references to in their brief, a copy of which they served on counsel for Mrs. Smith on February 16, 1965.

The flippant and frivelous quotation from the Court of Appeals' unpublished opinion denying the Petitioner Mrs. Smith a rehearing in this case, which the joint administrators have seen fit to quote three times in their

brief, is a clear example of the unreasonable, arbitrary and capricious, rulings that were administered in this case withal, a quality of flippancy and overdrawn levity tantamount to caprice stamps the Court of Appeals' rulings and opinion in this case, discernible only in reading the final opinion, which clearly showed that neither the District Court nor the Court of Appeals knew anything about the true and correct facts of this case, or the pleadings filed in this case, and they refused to apply the Kentucky law or the Kentucky Statutes.

The constitutional guaranty demands that law shall not be unreasonable, arbitrary, or capricious, *Nebbia* v. *People of State of New York, N.Y.*, 54 S.Ct. 505, 291 U.S. 502, 78 L.Ed. 940, 89 A.L.R. 1469; *North American Co.* v. *Securities and Exchange Commission,* C.C.A., 133 F. 2d 148, 154.

The joint administrators failed and refused to file a final settlement of their accounts of the O'Brien Estate, on March 1, 1936, when it was due to be filed, in violation of KRS 25.175, and they failed and refused to file one for a whole year before any litigation was started by the joint administrators in February 1937, by their filing of their first trumped-up settlement suit in the O'Brien Estate in the Jefferson Circuit Court, and for sixteen years, they failed and refused to file any kind of a settlement in County Court. Under the Statutes and laws of Kentucky, Mrs. Smith had the legal right to wait until May 1 1957, to **surcharge** and **falsify** the purported final settlement of the accounts of these joint administrators, of which was approved by the County Court on March 5, 1952, and amended on May 1, 1952.

Mrs. Smith's Writ of Certiorari clearly showed (1) that the Court of Appeals rendered a decision in this case which is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit, the Circuit Court of Appeals for the Fifth Circuit, the Circuit Court of Appeals for the Seventh Circuit and in conflict with its own

decision in the case of *Rogers* v. *Girard Trust Co.* in 1947, on the same matter, and she cited the cases which uphold this contention. See the cases of: *Griffith* v. *Bank of New York,* 147 Fed. (2d) 899, February 16, 1945; *Paul et al* v. *Girard Trust Co.,* 124 F. 2d 809, (1941); *Rogers* v. *Girard Trust Co.,* 159 F. 2d 239, (1947); and *Meredith* v. *City of Winter Haven,* 320 U.S. 228-231; 64 S.Ct. 7, at page 11, (1943). The Trust Companies' brief failed to show to the contrary. (See other cases cited in Writ of Certiorari, pp 157-164).

(2) Mrs. Smith's Writ clearly showed that the Court of Appeals decided an important Kentucky State question, on the final settlement of the accounts of the Joint administrators of the Estate of John A. O'Brien, in conflict with the applicable Kentucky law and Kentucky statutes governing the final settlement of the said estate. The Trust Companies' brief failed to show to the contrary.

(3) Mrs. Smith's Writ clearly showed that the Court of Appeals decision has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision and for the above reasons, under Rule 19, of the Rules of this Court, the Petition for a **Writ of Certiorari should be granted.**

(4) Further, Mrs. Smith's Writ of Certiorari clearly showed that the Court of Appeals denied Mrs. Smith due process and thereby decided a federal question, in a way in conflict with applicable decisions of this Court when it denied Mrs. Smith the right of a trial in this case.

From 1792 to date, there has been established by custom, statutes and precedent, a course of legal proceedings in the final administration of estates in Kentucky where there are no probate courts as such.

"Due Process of Law implies **the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or**

property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof every material fact which bears on the question of right in the matter involved." If any question of fact or liability be conclusively presumed against him, this is not due process of law. *Zeigler* v. *Railroad Co.*, 58 Ala. 599.

It is the right of every person, before he can be deprived of his property, to have a trial according to law; to have the same character of trial given by the same established rules of evidence and procedure as are applied in other cases under similar conditions. *San Jose Ranch Co.* v. *San Jose Land & Water Co.*, 58 P. 824, 825, 126 Cal. 322.

As applied to judicial proceeding, "due process clause" means party shall have his day in court. *U.S.C.A. Const. Amend. 14;* Mo. St. Ann. Const. Art. 2, Sec. 30. State ex rel. and to use of *Chicago Great Western R. Co.* v. *Public Service Commission* (Mo.) 51 S.W. (2d) 73, 77.

Due process of law means a course of legal proceedings which secures to every person a judicial trial before he can be deprived of life, liberty, or property. *Peerce* v. *Kitzmiller,* 19 W.Va. 564, 565; *White* v. *Crump,* 19 W.Va. 583, 595.

Law of the land, within Fourteenth Amendment, guaranteeing due process, includes those principles of procedure and equity which have become established. *Owens* v. *Battenfield* (C.C.A. Okla.) 33 F. (2d) 753, 757.

Due Process of Law implies the right to contradict by proof every material fact which bears on questions of right involved. *Broadway* v. *Alabama Dry Dock & Shipbuilding Co.*, 20 So. 2d 41, 50, 246 Ala. 201.

Due Process of Law guarantees that every person have protection of his day in Court and the benefit of the general law of his State. So, when Mrs. Smith was denied the right to have a trial on the issues raised by the

denials by Mrs. Smith to the allegations of the Compiaint, and the joint administrators purported final settlements of accounts consisting of 67 printed pages which they made a part of their Complaint by labeling it Exhibit No. 1, thereto, with exhibits copied therein, she was denied Due Process of Law.

Mrs. Smith had a legal right to have a trial on the issues thus raised by her denials in her original Answer filed on November 12, 1956, regardless of whether she would be permitted to surcharge and falsify the purported final settlement of accounts of the joint administrators which she sought to do by her tendered amendment.

The issues involved in this case involve far more than the issue of the sale of Mrs. Smith's partnership interest in the Edward J. O'Brien & Company and its four subsidiaries. It involves the entire administration of the O'Brien estate for thirty-one (31) years, by the joint administrators and their mis-management of the entire estate and their mis-appropriation of stocks and securities and cash funds, belonging to Mrs. Smith, the sole beneficiary of the estate, (see Writ of Certiorari pp 73-77).

Further, when Mrs. Smith was denied the right to file her exceptions to the items in the purported final settlement of the accounts of the estate of John A. O'Brien filed by the Joint administrators which she deemed invalid and illegal, and to have a trial thereon, and deprived of the right of presenting every material fact to test the validity of the items in the settlement, she was further denied her day in Court and the benefit of the Kentucky law, as well as $73,756.98 cash, plus interest, of her personal property without due process of law, and other valuable assets as set forth herein.

In the case of *National Sur. Corp.* v. *Sharpe,* 59 S.E. 2d 593, 597, 232 N.C. 98, it held:

> "In its procedural aspects the constitutional guaranty of 'due process of law' assures to every person his day

in court and means that there can be no proceeding against life, liberty or property without observance of those general rules established in American system of jurisprudence for the security of private rights."

See also the cases of, *Brown* v. *Levee Com'rs,* 50 Miss. 468; *Embury* v. *Conner,* 3 N.Y. 511, 517, 53 Am. Dec. 325; *Davidson* v. *New Orleans,* 96 U.S. 104, 24 L.Ed. 616; *People* v. *Skinner, Cal.,* 110 P. 2d 41, 45; *State* v. *Rossi,* 71 R.I. 284, 43 A. 2d 323, 326; *Direct Plumbing Supply Co.* v. *City of Dayton,* 138 Ohio St. 540, 38 N.E. 2d 70, 72, 137 A.L.R. 1058; *Stoner* v. *Higginson,* 316 Pa. 481, 175 A. 527, 531; *McKenna* v. *McKenna,* 70 Ill. App. 340; *Ryan's Furniture Exchange* v. *McNair,* 162 So. 483, 120 Fla. 109; *U.S.C.A. Const. Amend. 14;* Mo. St. Ann. Const. art. 2, Sec. 30; *Peerce* v. *Kitzmiller,* 19 W Va. 564, 565; *Owens* v. *Battenfield* (C.C.A. Okl.) 33 F. (2d), 753, 757; *Quimby* v. *Hazen,* 54 Vt. 132, 139.

In the case of *Staley* v. *Safe Deposit & Trust Co. of Baltimore,* 56 A. 2d 144, 148, 189 Md. 447, it held:

> "A judgment in personam without personal service or appearance, or a judgment in rem without jurisdiction over the res, is not 'due process of law' and is not entitled to full faith and credit in another state."

A County Probate Court as such in Kentucky does not have, and lacks jurisdiction by statute or otherwise to render an *in personam* or *in rem judgment* and never has since Kentucky became a State (Commonwealth) on June 6, 1792.

The Petitioner, Mrs. Smith, attaches hereto and files herewith the Opinion of the District Court filed and entered in the within case on March 4, 1961, which is marked Appendix "E" and consists of pages 1a through 23a. Also Mrs. Smith attaches and files herewith her Petition for Rehearing on the District Court's Opinion, marked Appendix "F" consisting of pages 1a through 46a, filed on

April 3, 1961 which we respectfully request this Court to consider.

If this Court denies this Petition for Rehearing, by approving the fallacious opinion of the District Court (found in Appendix "E" herein), the Rule of Law established by the case of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64; 82 L. ed. 1188; 58 S. Ct. 817; 114 ALR 1487, will be completely overthrown, it will create chaos and untold problems in the final settlements of estates in Kentucky by these two trust companies and all other personal administrations.

We request this Court to follow the rule of law in the *Erie* v. *Tompkins* case, *supra*, according to the law and statutes in Kentucky governing the final settlements of the accounts of administrators of estates in Kentucky and to grant this Petition for Rehearing.

CONCLUSION

Petitioner Mrs. Smith, never had any trial in this lawsuit which was filed against her by the two Trust Companies on September 13, 1956, and she did not file any exceptions to the purported final settlements of the accounts of the Joint Administrators of the O'Brien Estate, she was denied the right to have a trial on the merits of the validity of the claims or items contained in the purported final settlement of the accounts of the Joint Administrators of the O'Brien Estate.

By the denial to Mrs. Smith of the right to have a trial in this lawsuit filed against her, the District Court, and the Court of Appeals for the Sixth Circuit, deprived her of her rights, and sustained a denial of Due Process guaranteed by the Fourteenth Amendment to the Federal Constitution.

For the foregoing reasons, as well as for the reasons set out in the Petition For Writ of Certiorari, it is respectfully submitted that this Petition For Rehearing should be granted, and that the Order of this Court of

March 15, 1965, denying the writ of certiorari be vacated, and that the Petition For Writ of Certiorari be granted.

WALTER B. SMITH
800 Columbia Building,
Fourth and Main Streets,
Louisville, Kentucky
Counsel for Petitioner

May 8, 1965.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

WALTER B. SMITH
Counsel for Petitioner

APPENDIX "E"

Opinion of the United States District Court for the Western District of Kentucky. Filed on March 4, 1961 and

APPENDIX "F"

Defendant Patricia R. Smith's Petition for Rehearing on Opinion of The United States District Court for the Western District of Kentucky. Filed on April 3, 1961.

APPENDIX E

OPINION FILED AND ENTERED ON MARCH 4, 1961.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
At Louisville

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, - - - - *Plaintiffs,*

vs. CIVIL ACTION NO. 3218

PATRICIA R. SMITH, - - - - - - *Defendant.*

This action was commenced in the Circuit Court for Jefferson County, Kentucky, Chancery Branch, First Division. It was removed to this Court by the defendant who is the widow of the decedent, John A. O'Brien. John A. O'Brien died on January 1, 1934, leaving more than one testamentary instrument. At the time of his death John A. O'Brien was one of the owners of Edward J. O'Brien & Company. There was a dispute between the defendant, the widow of John A. O'Brien, and members of the O'Brien family as to the validity of the testamentary instruments found after the death of John A. O'Brien; and a further dispute as to the value of his interest in the Edward J. O'Brien & Company; the effectiveness of an insurance trust; and other matters. After extensive negotiations a settlement agreement was entered into between the defendant and the other parties involved. As a result of such settlement the defendant received several hundreds of thousands of dollars. One year and a few months after the settlement agreement had been executed the defendant

became dissatisfied and litigation was commenced. In the interim period there have been a number of lawsuits all pointed toward the determination of the issue of fraud in the settlement between the defendant and the other interested relatives and the Administrators. A list of the cases known to this Court at this time is shown below.[1]

In the course of the years defendant has used various means to disqualify the Federal Judges in Kentucky, and the writer was designated to hear the cause.

There are before us two motions: plaintiffs' motion for a summary judgment on defendant's original counterclaim, and defndant's motion to file an amended counterclaim.

In essence plaintiffs' motion for a summary judgment on the defendant's original counterclaim is based upon the theory that the defendant is barred, by the statute of limitations and by the rules of res judicata, from raising the issues presented by her original counterclaim. The original counterclaim embodies a charge of fraud against the administrators arising out of the original settlement of the rights of the estate in the Edward J. O'Brien & Company. The plaintiffs' objection to the motion for leave to file an amended counterclaim is based upon the statute

---

1 (1) Administrators' Suit to Settle Mr. O'Brien's Estate, in Jefferson Circuit Court (Louisville, No. 250,301, *Louisville Trust Co. et al v. Patricia R. O'Brien et al* (February 18, 1937-May 16, 1950):

Reported decisions: *Smith v. Burnett, Judge,* 300 Ky. 249, 188 S.W. 2d 480—Mrs. O'Brien-Smith's original action in Court of Appeals of Kentucky for Writ of Prohibition against Judge Burnett further proceeding in above Administrator's Settlement Suit; writ denied June 15, 1945;

First Appeal of Administrators' above Settlement Suit, *Smith v. Louisville Trust Co. et al,* 308 Ky. 189, 213 S.W. 2d 987 (June 8, 1948; Rehearing Denied October 29, 1948);

of limitations and also upon the theory that this Court has no probate jurisdiction which would permit it to consider the amended counterclaim in which the defendant asserts the right to surcharge the account of the plaintiff administrators in the Estate of John A. O'Brien, deceased.

The original action by the Administrators is based upon an order of the County Court of Jefferson County, Kentucky which plaintiffs claim settled their final account, creating in them a right to recover from the defendant an amount equal to the approved expenses and fees in excess of the monies in the hands of the administrators. All other funds of the estate have been previously expended in a manner which the plaintiffs claim was approved by the Jefferson County Court, or distributed to the defendant.

Reference to previous litigation will be made only when it is pertinent to the determination of the motions before the Court in this case.

Second Appeal of Administrators' Settlement Suit, *Louisville Trust v. Smith,* 313 Ky. 15, 230 S.W. 2d 64 (May 16, 1950).

(II) Mrs. O'Brien-Smith's Rescission Suit, to rescind her November 5-15, 1935, Compromise Sale of Mr. O'Brien's partnership interest in E. J. O'Brien & Co., in Jefferson Circuit Court No. 250,536, *Patricia R. O'Brien v. Edwin J. O'Brien et al* (March 10, 1937-May 8, 1944):

Reported decisions:

O'Brien v. O'Brien, 294 Ky. 793, 172 S.W. 2d 595; S.C. cert. den. 321 U.S. 767 (January 31, 1944); Rehearing Denied 322 U.S. 769 (May 8, 1944).

(III) Mrs. O'Brien-Smith's $822,035.04 Damage Suit against Administrators, re her November 5-15, 1935, Compromise Sale of Mr. O'Brien's above partnership interest, in Federal Court (Louisville) No. 870, *Patricia R. Smith v. Louisville Trust Co. et al* (March 16, 1945-March 10, 1949):

Statutes of Limitations of Kentucky distinguish between different types of actions. The Administrators rely upon *§ 413.090 Kentucky Revised Statutes (Carroll's Ky. Stats. § 2514):*

"413.090 (2514) Action upon judgment, written contract or bond; fifteen year limitation. Except as provided in KRS 413.110, 413.200, 413.210, 413.220, 413.230 and 413.240, the following actions shall be commenced *within fifteen years* after the cause of action first accrued: • • •

(2) An action upon a recognizance, bond or written contract.

(3) An action upon the official bond of a • • • personal representative, guardian, committee, or trustee appointed by a court or authority of law.

(4) An action • • • upon a bond or obligation for the payment of money or property or for the performance of any undertaking."

§ 413.160 Kentucky Revised Statutes (Carroll's Rev. Stats. § 2522:

"413.160 (2522) Actions not provided for by statute; ten year limitation. An action for relief, not provided for by statute, can only be commenced *within ten years* after the cause of action accrued."

Reported decisions:

Commonwealth v. Shilladay, 311 Ky. 478, 224 S.W. 2d 685—Indictments returned on April 17, 1948 of Accountants (representatives of Arthur Young Company, accounting firm) who audited E. J. O'Brien & Co.'s books for use in the above $822,035.04 Federal Court Damage Suit; law certified November 18, 1949.

Above Damage Suit dismissed on March 10, 1949, without prejudice, upon Mrs. O'Brien-Smith's Motion—after Mrs. O'Brien-Smith filed her Affidavit of Personal Bias (on May 19, 1947), against Judge Shelbourne who disqualified himself (May 29, 1947), and Judge Freed of Cleveland was designated (June 26, 1947) to try case.

§ 413.120 Kentucky Revised Statutes (Carroll's Ky. Stats. §§ 2515; 2518):

"413.120 (2515; 2518) Actions to be brought within five years. The following actions shall be commenced *within five years* after the cause of action accrued: • • •

(7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated. • • •

(12) An action for relief or damages on the ground of fraud or mistake."

§ 413.130 Kentucky Revised Statutes (Carroll's Ky. Stats. §§ 2518; 2519; 2520):

"413.120 (2518; 2519; 2520) When certain actions in KRS 413.120 accrue; regulations for. • • •

(3) In an action for relief or damages for fraud or mistake, referred to in sub-section (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced *within ten years* after the time of making the contract or the perpetration of the fraud."

and *§ 413.230 Kentucky Revised Statutes (Carroll's Ky. Stats. §2550):*

(IV) Proceedings in Administrators' Declaratory Judgment and Settlement Suit in Jefferson Circuit Court, No. 313-655, *Louisville Trust Co. et al v. Patricia R. Smith et al* (March 31, 1949-March 6, 1951):

Reported decisions:
Smith v. Louisville Trust Co., 262 S.W. 2d (Ky.) 479 (November 20, 1953).

(V) Mrs. O'Brien-Smith's suit to enjoin above Suit No. 313,655, of Administrators for Declaration of Rights and Settlement, Jefferson Circuit Court No. 313,986, *Patricia R. Smith v. Louisville Trust Co. et al* (April 21, 1949-March 6, 1951):

Reported decision:
Smith v. Louisville Trust Co., 237 S.W. 2d (Ky.) 836 (March 6, 1951; Rehearing Denied April 17, 1951).

"413.230 (2550) Sureties who are discharged after five years. A surety for an executor, administrator, guardian or curator, * * * shall be discharged from all liability to a distributee, devisee or ward when *five years have elapsed* without suit after the cause of action accrued, and after the devisee, distributee or ward attained full age. * * *"

Thus it is necessary for the court to determine when the defendant's cause of action for the alleged fraud arose and the nature of the cause of action which she asserts. It must be obvious, from the report of the first litigation, *O'Brien v. O'Brien*, 294 Ky. 793; 172 S.W. 2d 595 (1943); S.C. Cert. Den. 321 U.S. 767 (1944), in which the defendant pursued her claim against the O'Brien family and the administrators through the Court of Appeals of Kentucky and followed an adverse decision by that court with an application for a Writ of Certiorari to the Supreme Court of the United States, which was denied, that the defendant knew she had or could assert a claim of fraud against the plaintiffs here, at the time she instituted her original action for fraud in 1937 since she claimed fraud on the part of all parties concerned in that case. At page 609 of 172 S.W. 2d, the Court of Appeals of Kentucky disposed of the plaintiff's case as follows:

"In conclusion, it has not been overlooked that the burden rested upon the plaintiff to show a failure to reveal material facts in the settlement, which is essentially to prove fraud and deceit. But the degree of proof in cases of this kind varies inversely with the knowledge of the matters involved and the trust reposed in the other by the party challenging the settlement. Thus where both parties are acquainted with the part-

---

(VI) Administrators' Final Settlement of Estate in Jefferson County Court (Louisville), No. 24, 146, In re *Estate of John A. O'Brien*, deceased, for final settlement of Estate of John A. O'Brien (June 21, 1950-May 1, 1952):

nership affairs and neither reposed special confidence in the other, the burden of proof is greater than where one did not have full knowledge of the business and relied upon his partner. In such a case the settlement is deemed less conclusive. *Chambers v. Johnston,* 180 Ky. 73, 201 S.W. 488; 40 Am. Jur., Partnership, § 131. We have the peculiar situation here of innocence by the challenger of the conditions of the business, who, however, had no confidence in the representations of those with whom she was dealing and who had competent and trustworthy counselors. Taking into consideration all these factors as well as the formidable ones mentioned in the beginning concerning the attitude of those with whom the plaintiff had dealt, we are of the opinion there was a fair and reasonable settlement and contract of purchase and sale."

The present action was commenced in the Circuit Court for Jefferson County, Kentucky on September 13, 1956. It appears clear to this Court that any claim of fraud against the plaintiffs is barred by *Kentucky Revised Statutes, § 413.120, supra,* which requires actions for damages on the ground of fraud or mistake to be commenced within five years after the cause of action accrued even though *§ 413.130 KRS* is applied which section provides that the cause of action shall not be deemed to have accrued until

---

Reported decisions:

Smith v. Shamburger, Judge, 314 Ky. 850, 238 S.W. 2d 844—Mrs. O'Brien-Smith's Original Action in Court of Appeals of Kentucky to stay Judge Shamburger from proceeding in Jefferson County Court for the above final Settlement of John A. O'Brien Estate (January 26, 1951; Rehearing Denied May 11, 1951).

Mrs. O'Brien-Smith then commenced (October 1, 1951) Removal Proceedings in Federal Court (Louisville), No. 2224, to remove to Federal Court Administrators' Jefferson County Court proceedings for Final Settlement of Mr. O'Brien's Estate; after Judges Shelbourne and Swinford had disqualified themselves to sit.

the discovery of the fraud or mistake and continues *inter alia*:

> "However, the action shall be commenced *within 10 years* after the time of making the contract or the perpetration of the fraud."

Since the defendant was aware of her claim of fraud in 1937 the action is barred by *Kentucky Revised Statutes*, § *413.160* which requires that actions not provided for by statute shall be commenced within ten years, and by § *413.090* KRS which requires actions upon official bonds to be commenced within fifteen years. Clearly, twenty years has passed from the time of Mrs. Smith's discovery of the alleged fraud to the time of the commencement of this action unless she can amend her counterclaim and surcharge the account of the administrators. She cannot sue the administrators as principals or as sureties being barred by the statutes previously cited, which allow her only five years after the cause of action accrues.

In the opinion of this Court the original counterclaim filed by the defendant is barred by the Statute of Limitations for the reasons set forth above.

In addition to the plaintiffs' claim that the matters complained of in the defendant's cross-complaint are barred as being res judicata. It being their theory that all the claims of fraud now asserted were disposed of in the original litigation between this defendant, as plaintiff, and the O'Briens and these plaintiffs as defendants, *Patricia R. O'Brien v. Edwin J. O'Brien et al*, No. 250, 536, 294 Ky. 793, 172 S.W. 2d 595, Cert. Denied 321 U.S. 767. A review of that decision and of the counterclaim in the instant case, supported by the voluminous briefs filed by the defendant's counsel, persuades this Court that the rule recently laid down by the Court of Appeals for this Circuit in *Davis v. McKinnon & Mooney*, 266 F. 2d 870, 873 (1959), supported by other cases to the same effect, *Bernhard v. Bank Of*

America National Trust & Savings Associations, 19 Cal. 2d 807, 122 P.2d 892; and *Hays v. Sturgill*, 302 Ky. 31, 193 S.W. 2d 648, 164 A.L.R. 868, should be applied here:

> "• • • Bernhard v. Bank of America National Trust & Savings Association, 19 Cal. 2d 807, 122 P. 2d 892, is an excellent discussion of the entire question. The court declares, 122 P. 2d at page 894:
>
> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. Coca Cola Co. v. Pepsi Cola Co., supra (6 W.W. Harr. 124, 36 Del. 124, 172 A.260). See cases cited in 24 Am. & Eng. Ency., 2d Ed., 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872. He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. *Ibid.*
>
> There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
>
> "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. See 7 Bentham's Works, Bowring's Ed., 171. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. Coca Cola Co. v. Pepsi-Cola Co., supra; Liberty Mutual Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506; Atkinson v. White, 60 Me. 396; Eagle, etc. Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490; Jenkins v. Atlantic Coast Line R. Co., 89 S.C. 408, 71 S.E. 1010; United States v. Wexler, D.C., 8 F.2d 880. See Good Health Dairy Products Corp. of Rochester v. Emery,

275 N.Y. 14, 9 N.E. 2d 758, 112 A.L.R. 401. The commentators are almost unanimously in accord. 35 Yale L. J. 607; 9 Va.L.Reg. (N.S.) 241; 29 Ill. L.Rev. 93; 18 N.Y.U.L.Q.R. 565, 570; 12 Corn. L.Q. 92. The courts of most jurisdictions have in effect accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. See cases cited in 35 Yale L.J. 607, 610; 9 Va.L. Reg. (N.S.) 241, 245-247; 29 Ill. L. Rev. 93, 94; 18 N.Y.U.L.Q.R. 565, 566, 567; 34 C.J. 988, 989. * * * The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries."

The above rule would bar the defendant from asserting the claims set forth in her cross-complaint if the present plaintiffs had not been parties to the original litigation, but the fact is that they were parties to the original litigation and the claims asserted are therefore res judicata. Thus the plaintiffs are entitled to a summary judgment as to the original counterclaim on two grounds: (1) claims asserted are barred by the statute of limitations, and (2) the claims asserted are barred by application of the rule as to res judicata.

There remains to be determined whether the defendant should be premitted to file an amended counterclaim surcharging the account of the plaintiffs. It is axiomatic that the District Courts of the United States in such districts as this have no jurisdiction over probate matters. *Markham v. Allen*, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256; *Harris v. Zion Savings Bank & Trust Co.*, 317 U.S. 447, 63 S.Ct. 354, 87 L.Ed. 390, 51 Am. Banks Rep. N.S. 825, rehearing denied 318 U.S. 799, 63 S.Ct. 659, 87 L.Ed. 1163; *Spears v.*

Spears, 162 F. 2d 345 (C.A. 6, 1947), Cert. Den. 332 U.S. 768, 68 S.Ct. 78, 92 L.Ed. 353. This is so clear that citations should be unnecessary.

The amended counterclaim which defendant desires to file, if heard by this United States District Court would require the Court to determine the accuracy of the accounts filed by the administrators, a function purely probate in nature, confided to the State Courts of Kentucky, and which function this United States District Court is barred from performing under the cases cited above.

In any event the right of the defendant to surcharge an account must depend upon whether the account filed was a final account, which it was so labeled and whether the defendant took part in the proceedings in connection with the settlement of that account as required by the Kentucky Statutes. *Logan's Administrator v. Troutman's Executor*, 10 Ky. 66; *Briscoe's Distributees v. Brady, Adm.*, 22 Ky. 134; *Bell v. Henshaw*, 91 Ky. 430, 15 S.W. 3; *Turley's Admr. v. Barnes*, 103 Ky. 127; *Welch v. Lewis, et al.*, 104 Ky. 531, 47 S.W. 454; *Harper v. Lamb*, 202 Ky. 771, 261 S.W. 280, *Dees' Adm'r. v. Dees' Ex'r.*, 249 Ky. 650, 61 S.W. 2d 301.

An examination of the file and consideration of the concessions of defendant's counsel, made on the argument of this case, show that the paper labeled "Final ACCOUNT" filed by the plaintiffs with the Jefferson County Court was filed with the County Court on June 21, 1950. In that account the administrators asked approval of their actions as administrators and requested the County Court to determine, adjudge and fix the fair and reasonable amounts for attorney fees and administrators' compensation. The defendant filed motions for extensions of time within which to file exceptions to the final account which extensions were granted, and objections to consideration of the settlement. The denial of the objections was appealed. Defendant filed a mandamus proceeding in the Kentucky Court of Appeals

to restrain the County Court from proceeding with a settlement of the final account; *Smith v. Shamburger, Judge,* 314 Ky. 850, 238 S.W. 2d 844; she attempted to remove the settlement proceedings to this United States District Court; she took all possible steps to prevent the settlement of the account, except that she did not file any actual exceptions challenging the propriety of the accounting for receipts and disbursements or the other actions of the administrators as set forth in the final account. It would appear that she had no objection to such accounting, as such.

On March 5, 1952, the final account was settled and the administrators were discharged and released from further liability under their bonds. This judgment of March 5, 1952, was amended on May 1, 1952, to authorize the administrators to recover from the defendant any over-payments, made by the administrators to the defendant. No appeal was taken from this judgment. The judgment and the amendment thereto are set forth in the margin to show the final effect thereof.[2]

---

[2] **JUDGMENT OF THE JEFFERSON COUNTY COURT, LOUISVILLE, KENTUCKY OF (March 5, 1952.)**

This cause came on to be heard upon:

(1) The prayer of The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased (for brevity, hereafter called administrators), contained in "Their Account and Final Settlement of the Execution of Their Trust", filed herein June 21, 1950, for (a) The confirmation and approval of their Accounts, and their discharge and release from liability upon their bonds; (b) the determination of their compensation as administrators, and the fees for the legal services of their counsel; (c) The determination of the validity of, and, if valid, to whom are payable, the bequests in the will of John

Under Kentucky Law there are two ways to challenge the settlement of the final account of an administrator. It must be done by appeal if the person challenging has taken part in the proceeding leading to the approval of the account. *Bell v. Henshaw*, 91 Ky. 430, 15 S.W. 3 (1891); *Dees' Adm'r. v. Dees' Ex'r.*, 249 Ky. 650, 61 S.W. 2d 301 (1933); *Caplinger v. Pritchard*, 136 Ky. 349, 124 S.W. 352 (1910). If the challenging party has not participated in the proceeding leading to the judgment settling the final account then the account may be surcharged at any time within five years in an appropriate action. § *413.120 KRS.*

The judgment approving the final account as stated above was entered on March 5, 1952, it was amended on May 1, 1952.

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

A. O'Brien, deceased; (d) The settlement of questions and controversies between the Administrators and Patricia R. Smith, with respect to any claims that she makes against the Administrators; and (e) The recovery from Patricia R. Smith of any sum, or sums, necessary to pay (i) the administrators' compensation, (ii) the fees for their counsel, and (iii) expenses of administration, and for which the balance of the Estate's funds in the hands of the Administrators is insufficient;

(2) The evidence with respect to the Administrators' Final settlement, heard on July 12, December 17, 18, 19, 28, 1951, and January 2, 1952, by and before the Special Commissioner, which was reduced to writing, and, with the vouchers therefor, returned to, and filed in, this Court on January 7, 1952;

(3) The written Report dated January 5, 1952, and the written Supplemental Report dated January 7, 1952, made by the Special Commissioner, returned by him to the County Court, and endorsed by the Clerk thereof as filed therein at 9:08 A M. on January 7, 1952; and

We must determine whether the defendant had a right to surcharge the account of the administrators after final approval or whether her remedy was by appeal. It appears from the record that the defendant participated, to a substantial extent, in the proceeding leading to approval of the final account by using every remedy available to prevent the consideration and determination of the final account filed by the plaintiff administrators, including the filing of a mandamus action in the Court of Appeals of Kentucky, *Smith v. Shamburger, Judge*, 314 Ky. 850, 238 S.W. 2d 844 (1951).

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

the confirmation thereof by the Court on January 7, 1952;

(4) The Order dated January 29, 1952, allowing to A. Scott Hamilton, Special Commissioner, $2,000 as his fee as Special Commissioner, and to be taxed as a part of the court costs incident to this proceeding;

(5) Patricia R. Smith's Motion filed January 31, 1952, (a) To set aside the Court's Order of January 7, 1952, confirming the written Report and Supplemental Report of the Special Commissioner; and (b) to extend the time to April 4, 1952, to file Exceptions to the "so-called Final Settlement of this Estate and to the Commissioner's Report and Supplemental Report filed herein on January 7, 1952"; and the Court's Order thereon, and entered herein, dated January 31, 1952;

(6) The exceptions filed March 3, 1952, by Messrs. Oldham Clarke and Irvin Marcus (on behalf of their respective firms), to so much of the Special Commissioner's Report as allowed them only $10,000 for their services to the Administrators;

(7) Patricia R. Smith's various objections, protests, and motions for postponements and for extensions of time, (A) In which (i) "to file her exceptions and answer, or plead herein", and the affidavits filed in

In disposing of the mandamus action the Court of Appeals of Kentucky at page 848 of 238 S.W. 2d, stated as follows:

"In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court: (1) A settlement suit, filed April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former Judge of Jefferson County Court, directing the Co-Administrators to settle the estate. There has been no final disposition of either of these cases. It would

---

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

support thereof containing an express promise therein that "if given time (to) proceed with diligence and dispatch to prepare exceptions . . . and file same in this settlement"; (ii) "to plead or file her exceptions and an answer herein" (July 3, 1950); and (iii) "for the filing of exceptions and objections and answer thereto" (August 7, 9, September 8, 1950); (B) Motion to strike objections, motion for reconsideration, and motion to require "that time be extended for the filing of exceptions and objections, and answer" (August 22, September 1, 8, 1950); (C) Orders of this Court that the Settlement filed by the Administrators "is a Final Settlement of their Accounts as Co-Administrators" (September 8, 1950), and that Patricia R. Smith's Objections and Motions be overruled, and she be given Exceptions thereto (September 8, 1950;) and (D) Patricia R. Smith's Motion that no proof be heard (July 12, 1951); her objections to Hearing of Settlement (December 17, 1951); her Motion to Quash Return and Summons to testify (December 28, 1951); her Motion to set aside Special Commissioner's Report and Supplemental Report (January 31, 1952); and her Motion "to extend the time . . . to file exceptions to the so-called final settlement of the estate and to the Commissioner's Report

seem, however, that the filing of the accounting of the Co-Administrators in the County Court bestows upon the latter complete jurisdiction to finally determine all issues now in dispute. If those items now the subject of controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement.

"Admitting, for the sake of argument, but by no means concluding that the County Court is acting erroneously in this case, it cannot be said that petitioner will suffer irreparable damage, or any damage, as a result of any order entered by or about to be made by the County Court. However, assuming that certain errors have been or will be committed by the County Court in winding up this estate, *petitioner can obtain adequate relief therefrom by an appeal to the Circuit Court.*" (emphasis supplied)

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

and Supplemental Report thereon" (January 31, 1952); and

The various Orders entered thereon by this Court, and by the United States District Court for the Western District of Kentucky (In Mrs. Smith's removal of this proceeding from the Jefferson County Court to the District Court of the United States for the Western District of Kentucky), to the end that former interlocutory orders of this Court, if found to be inadvertent or erroneous, could still be corrected before Final Judgment is entered in the Settlement of the John A. O'Brien Estate;

The Court being advised;

It is now ordered, adjudged and decreed, as follows, to-wit:

FIRST: The Special Commissioners' Report and Supplemental Report, filed on January 7, 1952, were laid over for Exceptions not only until the first day of the

From the above language it would appear that the Court of Appeals was satisfied that the defendant beneficiary should be left to her remedy by appeal in her challenge to the final account filed by the administrators.

After the Court of Appeals determined the mandamus action supra, defendant attempted to remove the probate proceeding to this Court. This Court remanded the settlement proceedings to the Jefferson County Court. Thereafter, and on January 31, 1952, the defendant filed a petiton for an extension of time in which to file exceptions to the final settlement of John A. O'Brien, deceased. No exceptions were actually filed and on March 5, 1952, the Jefferson County Court entered its final judgment approving the final settlement, and on May 1, 1952, its amended judgment.

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

next Term of Court following their filing; to-wit: Monday, February 4, 1952, but, upon the Motion of Patricia R. Smith, she was given until March 3, 1952, to file Exceptions to the Special Commissioner's Settlement of the Accounts of the Administrators; and the case was continued to March 3, 1952, for that purpose.

On March 3, 1952, herein "to be known as the date of hearing", Patricia R. Smith did not file any Exceptions, but Messrs. Oldham Clarke and Irvin Marcus filed Exceptions on behalf of their respective firms; and the case was passed to March 4, 1952, upon which date the entire case came on for hearing, and was heard by the Court.

SECOND: The Exceptions filed by Messrs. Oldham Clarke and Irvin Marcus (on behalf of their respective firms), to so much of the Special Commissioner's Report as recommended only $10,000 be paid to them for their services, be, and the same hereby are, sustained; and they are allowed the sum of $15,000 as compensation for their services to the Administrators during the period March 12, 1937, to June 20, 1950.

In connection with the claim of fraud arising out of the compromise settlement of November, 1935, the Jefferson County Court disposed of this issue in its judgment as follows:

"SIXTH: Patricia R. Smith has *no* claim against the Administrators in either their individual capacities or in their capacities as Joint Administrators, for or on account of the sale of John A. O'Brien's partnership interest in E. J. O'Brien & Co., by the Compromise Settlement Agreement of November 5-15, 1935, or for, or on account of, the Administrators' action in approving that Agreement and their acts and transactions in perform-

---

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

THIRD: The Special Commissioner's Report and Supplemental Report (except as modified in Paragraph SECOND of this Judgment), with all the evidence heard by him and the vouchers filed by the Administrators, be, and the same hereby are, approved and confirmed; are adopted as this Court's Settlement of the Accounts of the Administrators; and are ordered to be recorded in the records of this court.

FOURTH: The legacies given by John A. O'Brien in his Will of July 1, 1933 (a) of $1,000 to the College of Arts & Sciences of Georgetown University, of Washington, D. C., and (b) of $5,000 to the Catholic Bishop of the Diocese in which he was living at the time of his death, have been paid in full; and the Administrators are released and discharged from any liability to pay those legacies, or either of them or any part thereof.

FIFTH: The compensation to the Administrators for their services in administering the John A. O'Brien Estate, and the fees for the legal services of Messrs. Allen, McElwaine, Dinning & Clark, Davis, Boehl, Viser & Marcus, and Bullitt, Dawson & Tarrant, and of A. Scott Hamilton, Special Commissioner, be, and the same hereby are fixed at the following sums set opposite their respective names, and those sums are hereby allowed to them.

ance of the terms thereof; which acts are hereby specifically approved and confirmed."

No appeal was taken from this final judgment.

While we recognize that under Rule 15, the right to amend should be freely extended, *Robbins v. Jordan*, 181 F. 2d 793, 86 U.S. App.D.C.304 (1950); *Kerrigan's Estate v. Joseph E. Seagram & Sons*, 199 F.2d 694 (C.A. 3, 1952) *Fli-Fab. Inc. v. U.S.*, 16 F.R.D. 553, (D.C., R.I., 1954), nevertheless this right should not be extended to a litigant when the

---

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952. CONTINUED FROM THE PRECEDING PAGE.

The Administrators are authorized and directed to pay to them (out of the assets of the John A. O'Brien Estate) such sums, which are hereby allowed in the Settlement of the Administrators' Accounts, to-wit:

The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased	$23,756.98
Oldham Clarke and Irvin Marcus, for the benefit of their respective law firms (Allen, McElwaine, Dinning & Clarke and Davis, Boehl, Viser & Marcus).....	15,000.00
Bullitt, Dawson & Tarrant, and Davis, Boehl, Viser & Marcus).....	35,000.00
A. Scott Hamilton, Special Commissioner....	2,000.00

SIXTH: Patricia R. Smith has no claim against the Administrators in either their individual capacities or in their capacities as Joint Administrators, for or on account of the sale of John A. O'Brien's partnership interest in E. J. O'Brien & Co., by the Compromise Settlement Agreement of November 5-15, 1935, or for, or on account of, the Administrators' action in approving that Agreement and their acts and transactions in performance of the terms thereof; which acts are hereby specifically approved and confirmed.

amendment asserts no claim nor defense cognizable by the Court in which the case is pending, *Stephans v. Reed*, 121 F.2d 696 (CCA 3, 1941); *Overfield v. Pennroad Corp.*, 39 F.Supp. 482 (D.C. Pa., 1941); *American Securit Co. v. Shatterproof Glass Corp.*, 166 F. Supp. 813 (D.C. Del 1958), aff'd, 268 F.2d 769, Cert. Den. 361, U.S. 902, 80 S.Ct. 210, 4 L.Ed. 2d 157. See also *Laughlin v. Garnett*, 138 F.2d 931, 78 U.S. App. D.C. 194 (1944), Cert. Den. 322 U.S. 738, 64 S.Ct. 1055, 88 L.Ed. 1572

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

SEVENTH: The Administrators, The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, shall recover from Patricia R. Smith, beneficiary under the Will of John A. O'Brien, deceased, and she shall pay to them, for the benefit of the following persons, the sums set opposite their respective names:

The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased.....	$23,756.98
Oldham, Clarke and Irvin Marcus, for the benefit of their respective law firms (Allen, McElwaine, Dinning & Clarke and Davis, Boehl, Viser & Marcus).....	15,000.00
Bullitt, Dawson & Tarrant and Davis, Boehl, Viser & Marcus.....	35,000.00
A. Scott Hamilton, Special Commissioner (This sum to be taxed as a part of the court costs incident to this proceeding).....	2,000.00

which sums will be credited by such amount of money as may remain in the hands of the Administrators after the discharge of the debts of the Estate, and the payment of any further taxable costs of this action.

This Court is completely satisfied that the defendant took part in and participated in the settlement of the final account within the meaning of the Kentucky law. *Logan's Adm'r v. Troutman's Ex'r.*, 10 Ky. 66 (1820); *Bell v. Henshaw*, 91 Ky. 430, 15 S.W. 3 (1891); *Turley's Adm'r v. Barnes*, 103 Ky. 127 (1898); *Welch v. Lewis, et al.*, 104 Ky. 531, 47 S.W. 454 (1898). She cannot now be permitted to challenge this settlement in this action. Her remedy was by appeal to the Jefferson County Circuit Court, and there-

---

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

EIGHTH: The Accounts of the Administrators be, and the same hereby are, confirmed and approved in all respects. The Estate of John A. O'Brien, deceased, be, and the same hereby is, finally settled. The Administrators be, and hereby they are, discharged and released from any, and all, further liability under their bonds as such."

[2] **AMENDED JUDGMENT OF MAY 1, 1952, OF THE JEFFERSON COUNTY COURT, LOUISVILLE, KENTUCKY.**

The balance $28,337.57 of the assets of this Estate in the hands of the Joint Administrators is not sufficient to pay the amounts heretofore allowed for the compensation to the Administrators, to their counsel, and the taxable costs herein, as set out in Paragraphs FIFTH and SEVENTH of the Judgment entered herein on March 5, 1952.

The Administrators have paid to Patricia O'Brien Smith, the PRINCIPAL legatee, devisee, distributee, and beneficiary under the will of John A. O'Brien, deceased, an undue proportion of her demand, and more than all of her share of any legacy under the Will of John A. O'Brien, deceased, or any interest she may have therein, under a mistake as to the solvency of the John A. O'Brien Estate, or otherwise.

after, if she desired, to the Court of Appeals of Kentucky. It is not for this Court at this time to review the findings of the County court of Jefferson County upon which the County Court based its final judgment approving the final settlement filed by the plaintiff administrators.

For the reasons herein stated the Court concludes that the plaintiffs' motion for summary judgment as to the defendant's original counterclaim should be granted. The defendant's motion to amend the counterclaim should be

---

AMENDED JUDGMENT OF JEFFERSON COUNTY COURT OF MAY 1, 1952. CONTINUED FROM PRECEDING PAGE.

Now, therefore, it is hereby ordered and adjudged that Paragraph EIGHT of the Judgment entered herein on March 5, 1952, be, and it is, now and hereby modified and amended to read as follows:

EIGHT: The accounts of the Joint Administrators be, and hereby they are, approved and confirmed, in all respects.

The Estate of John A. O'Brien, deceased. be, and the same hereby is, finally settled.

The Joint Administrators be, and hereby they are, authorized and empowered to sue, and to take any and all steps necessary or proper to recover from Patricia O'Brien Smith (1) All the amounts adjudged against her in Paragraph SEVENTH of this Judgment; and (2) Any and all additional amounts constituting any overpayment by the Joint Administrators to the said Patricia O'Brien Smith, which aggregate amounts so recovered shall be sufficient for the Joint Administrators to pay in full all obligations of the Joint Administrators and of the Estate, as authorized in Paragraphs FIFTH and SEVENTH of this Judgment.

/s/ Boman L. Shamburger,
Judge

May 1, 1952

denied. An order may be presented in accordance with the Court's conclusions.

/s/ W. Wallace Kent

United States District Judge
Western District of Michigan
Sitting by designation

ENTERED
MAR. 4, 1961
MARTIN R. GLENN, Clerk
By /s/ A. Rigsby
Deputy Clerk

A Copy: Attest
Martin R. Glenn, Clerk
By /s/ Loraine Miller
Deputy Clerk.

APPENDIX F

DEFENDANT PATRICIA R. SMITH'S PETITION FOR REHEARING

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
At Louisville

Civil Action No. 3218

THE LOUISVILLE TRUST COMPANY and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased - - - - - - Plaintiffs

vs.

PATRICIA R. SMITH - - - - - - - - - Defendant

PETITION FOR REHEARING ON THIS COURT'S OPINION (JUDGE W. WALLACE KENT) RENDERED AND FILED IN THE ABOVE STYLED CASE ON MARCH 4, 1961.—Filed on April 3, 1961. Stamped by Martin R. Glenn, Clerk.

This Court (Judge W. Wallace Kent) is in error in its statements of facts in this case on page one thereof, and there is no proof in the records of this case to support his findings or conclusions. The last will of John A. O'Brien, deceased, gave to his wife, Patricia R. O'Brien (now Smith) all of the personal property of his estate, and he did not own any real estate at the time of his death. See defendant's Exhibit "B", filed herein on February 23, 1957 with her Tendered Amended Answer and Amended Counterclaim.

The Court of Appeals of Kentucky in its opinion ruled that Mrs. Patricia O'Brien-Smith was the sole beneficiary of the will and of the estate of her husband, John A.

O'Brien. (See page one of the opinion in *O'Brien vs. O'Brien*, 294 Ky. 793; 172 S.W. 2d 959.

Further, that all of the insurance amounting to two hundred one thousand ($201,000.00) dollars on the life of John A. O'Brien, deceased, was made payable to Patricia R. O'Brien (now Smith) and that her name was the only one endorsed on the insurance policies and that *no endorsement of an insurance trust agreement had ever been put on any of the insurance policies.* Therefore, there was no legal reason for Mrs. O'Brien-Smith to take less than the net sound market value for her interest in the partnership firm of Edward J. O'Brien & Company. Bogus claims are not legitimate compromising points. See defendant's Exhibits Nos. 5, 6, 7, 8, 9, 10, 11 and 12, filed in this Court before Judge Kent on August 27, 1959, attached to defendant's Supplemental Affidavit, as set out below: (see Printed Transcript of Record pages 503a-631½a).

Defendant's Exhibit No. 5—A photostatic copy of Equitable Life Assurance Society of the United States, Policy No. 8,870,524, $50,000.00, Payable to Mrs. Ivy Patricia O'Brien (now Smith);

Defendant's Exhibit No. 6—A photostatic copy of Massachusetts Mutual Life Insurance Company, Policy No. 896601, $50,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 7—A photostatic copy of Massachusetts Mutual Life Insurance Company, Policy No. 841255, $35,000.00, payable to Mrs. Patricia R. O'Brien;

Defendant's Exhibit No. 8—A photostatic copy of Massachusetts Mutual Life Insurance Company, Policy No. 839641, $15,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 9—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy 146050A, $10,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 10—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy 146050B, $20,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 11—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy No. 175879, $1,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 12—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy No. 145589, $20,000.00, payable to Patricia R. O'Brien.

This Court is in error because there was never any dispute of any kind or description between Patricia O'Brien-Smith and the members of the family of John A. O'Brien, deceased, and there is nothing in the record of this case to support any such findings. Patricia O'Brien-Smith never spoke to any members of the family of John A. O'Brien, deceased, after the death of her husband. Mrs. O'Brien-Smith acted on the advice of J. G. McPherson, Vice-President of The Citizens Fidelity Bank & Trust Company, and her attorney, William Marshall Bullitt, of the firm of Bullitt, Dawson & Tarrant, *whom she paid twenty-three thousand three hundred dollars and thirty-three cents* ($23,333.33) *out of her own pocket to represent her in the settlement of the estate of* John A. O'Brien, deceased, at 12 o'clock at night on February 11, 1936, two years after the death of John A. O'Brien. After the Bullitt firm was paid by Mrs. O'Brien-Smith, they started representing, and now still represent the joint administrators against Mrs. O'Brien-Smith, and they have been granted by the Order and Judgment of May 1, 1952, of the Jefferson County Court a law fee of over thirty-five thousand ($35,000.00) dollars for prosecuting law suits, appeals and petitions for rehearings against the estate of John A. O'Brien, deceased, for over twenty-five years of which four opinions of the Court of Appeals of Kentucky in the said law suits were decided in favor of Mrs. O'Brien-Smith, the Court of Ap-

peals, in effect, holding that these law suits should not have been brought in the first place by the joint administrators of the estate of John A. O'Brien, deceased.

The settlement agreement referred to on page one of the opinion entered into was between the administrators, The Citizens Fidelity Bank & Trust Company, The Louisville Trust Company and the O'Brien family, the defendant, Mrs. O'Brien-Smith, did not sign the settlement agreement to sell her interest in the Edward J. O'Brien Tobacco Company until after the joint administrators signed it and told her if she did not sign it she would not get anything from her husband's estate.

The joint administrators on page 16 of their large, printed, green booklet entitled "Their Account and Final Settlement of the Execution of Their Trust" (which has been put into the records of this case without a motion or notice to the defendant or her counsel after this case was removed to Federal Court) have altered a record in this case, in fact a letter signed by Mrs. O'Brien-Smith and dated November 14, 1935, after a photostatic copy of said letter was made and pasted in their green booklet *by putting on the letter after the word "day" a large "9" in red ink, trying to alter* the date of November 14, 1935, at the top of the letter, signed by Mrs. O'Brien-Smith.

At the bottom of the first page of the opinion, this Court is in error. None of the law suits which have been prosecuted in the Estate of John A. O'Brien, deceased, and cited on pages two (2), three (3), and four (4) of this Court's opinion ever raised the issue of fraud against the joint administrators, The Citizens Fidelity Bank and Trust Company and The Louisville Trust Company.

Mrs. Patricia O'Brien-Smith only received two hundred eighty-thousand ($280,000.00) dollars for her interest in the partnership of Edward J. O'Brien Tobacco Company, from the three hundred eighty thousand ($380,000.00) dollars

which was the sale price received by the joint administrators. The joint administrators and their attorneys kept one hundred thousand ($100,000.00) dollars of the sale price of the partnership interest they claimed for the purpose of paying administrators' fees and lawyers' fees. The Federal Inheritance Taxes on the estate had already been paid before the joint administrators kept the one hundred thousand ($100,000.00) dollars. The fact that Mrs. O'Brien-Smith received thousands of dollars by the sale of the partnership interest, that in no way changes any of her legal rights to be paid the full amount or the net sound market value of her thirty-three and one-third (33 ⅓%) per cent interest in the partnership firm of Edward J. O'Brien & Company.

The joint administrators contend that all of the above amount which they kept has been spent by them in the prosecution of litigation against the said estate and Mrs. Smith with the exception of some thirty thousand dollars ($30,000.00). During this time no interest on the said amount has been paid to Mrs. Smith, or this estate. All of the above facts were before this Court and fully briefed before this opinion was rendered on March 4, 1961.

This Court (Judge W. Wallace Kent) is in error, and does not state correctly what motions were before him when he rendered the opinion in the above styled case which was filed and entered in the office of the Clerk of the United States District Court at Louisville on March 4, 1961.

On page two (2), sixth line from the top of the page, of the opinion states:

> "There are before us two motions: plaintiffs' motion for summary judgment on defendant's original counterclaim, and "defendant's motion to file an amended counterclaim."

THE MOTIONS WHICH WERE BEFORE THIS COURT WHEN THE OPINION WAS RENDERED

AND FILED ON MARCH 4, 1961, ARE AS FOLLOWS:

1. "Motion that trust company administrators be required to forthwith pay into court thirty-thousand ($30,000.00) dollars in U. S. Treasury 2% notes and seven hundred sixty-two dollars fifty-nine cents ($762.59) cash belonging to the estate of John A. O'Brien, deceased." Filed November 3, 1956.

2. "Motion for an order barring William Marshall Bullitt and all other members of the law firm of Bullitt, Dawson & Tarrant from representing the Louisville Trust Company and the Citizens Fidelity Bank & Trust Company against Patricia O'Brien-Smith in the within action or any other actions against her by said trust companies, because that law firm represented Mrs. O'Brien-Smith in the estate of John A. O'Brien, deceased, and were paid thirty-three thousand three hundred thirty-three dollars and thirty-three cents ($33,333.33) by her in 1936, two years after the death of John A. O'Brien." Filed November 3, 1956.

3. "Joint administrators motion for a summary judgment dismissing Mrs. Smith's counterclaim." Filed February 19, 1957.

4. "Defendant Patricia R. Smith's motion for leave to file an amended answer and an amended counterclaim surcharging the joint administrator's settlement and on bond of the estate of John A. O'Brien, deceased." with Exhibits B, C, D, E, F and G attached thereto. Filed on February 23, 1957.

5. "Joint administrators' motion for leave to file their administrators' amended reply to Mrs. O'Brien-Smith's counterclaim." Filed September 8, 1959.

6. "Joint administrators' amended reply to Mrs. O'Brien-Smith's counterclaim with six exhibits annexed thereto." The said reply was printed and also the six (6) exhibits were printed therein. The amended reply and exhibits consisted of 152 printed pages. Tendered September 8, 1959.

Defendant Patricia R. Smith's Petition For Rehearing

7. "Joint Administrators' amended motion for a sumary judgment by the joint administrators to dismiss Mrs. Smith's counterclaim." Tendered September 8, 1959.

This Court is in error in paragraph three (3) on page 2 of its opinion, *the "plaintiff's (joint administrators) Original Motion for a Summary Judgment,"* filed in the within case on February 19, 1957, to dismiss Mrs. Smith's original counterclaim, which was filed in the within case on November 12, 1956, with her "original answer," *was not based upon the theory that the defendant, Mrs. Smith, is barred by the rule of res judicata from raising the issues presented by her original counterclaim.*

Surely this Court (Judge W. Wallace Kent) remembers that *he is the one who suggested to the joint administrators and their attorneys* at a pre-trial conference in Louisville on August 28, 1959, *that they should raise the issue of the rule of res judicata,* and gave the attorneys for the joint administrators the law citations of *Davis v. McKinnon and Mooney,* and told them that he would mail them the advanced sheets before the opinion was printed, in order to help them to try to prove it.

At the above meeting, counsel for Mrs. Smith stated to this Court that no relief was sought against the joint administrators, and no relief was prayed for in the Reformed and Amended Petition, filed in the case of *O'Brien vs. O'Brien,* 294 Ky. 793; 172 S.W. 2d 595. Counsel for the defendant further stated to this court that the joint administrators were only named as nominal parties defendant in the "Rescission Suit," so that Mrs. O'Brien-Smith could maintain the "Rescission Suit" in her name after the joint administrators refused to file the suit for rescission of the sale of the partnership interest belonging to the estate of John A. O'Brien, deceased, in the Edward J. O'Brien Tobacco Company.

Judge E. B. Freed, Judge of the United States District Court at Cleveland, Ohio, upheld Mrs. Smith in the above contentions, and ruled that the case of *O'Brien vs. O'Brien, supra,* did not make the issue of fraud against the joint administrators res judicata, and we again quote the ruling of Judge Freed and copy herein his order on his opinion in the case of—

> "In the United States District Court for the Western District of Kentucky at Louisville, No. 870, Patricia R. Smith v. The Louisville Trust Company and The Citizens Fidelity Bank and Trust Company, filed on March 16, 1945, and dismissed without prejudice by Mrs. Smith on March 10, 1949."

"IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

"PATRICIA R. SMITH	)	CIVIL ACTION NO. 870
v.	)	*ORDER*
THE LOUISVILLE TRUST COMPANY, a corporation, et al)	)	

This matter came on for hearing on the motion of the defendants, The Louisville Trust Company and Citizens Fidelity Bank and Trust Company, for a summary judgment under favor of Rule 56 of the Rules of Civil Procedure, the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment be and is hereby overruled.

s/ E. B. FREED
UNITED STATES DISTRICT JUDGE"

November 7, 1947

Defendant Patricia R. Smith's Petition For Rehearing

"IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PATRICIA R. SMITH	)	CIVIL ACTION NO. 870
vs.	)	MEMORANDUM RE
THE LOUISVILLE TRUST	)	MOTION FOR
COMPANY	)	SUMMARY
a corporation, et al.	)	JUDGMENT

FREED, J:

Defendants' motion for summary judgment is predicated on the contention that two prior actions in the State Courts of Kentucky prohibit a right of recovery by the Plaintiff in this Court. The prior actions were referred to in the Defendants' answer, in the respective briefs of the parties and arguments of counsel as the "Rescission suit" and "Settlement suit".

The record in the Settlement suit clearly discloses that the Court refused to adjudicate the precise claim of Plaintiff urged in this action. It refused to receive any evidence in support of the charge of negligence by the Defendant corporations in handling the estate of John O'Brien. (See pages 12 to 20 of the second amended answer or pages 250 to 257 of the printed transcript of record). Such ruling by that Court in the Settlement suit cannot conceivably result in a bar to the instant controversy.

Whether the judgment in the O'Brien vs. O'Brien, (294 Ky. 793), the Rescission suit, is res judicata as to this action or constitutes an estoppel by judgment must be determined by the Law of Kentucky. Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (309 U.S. 4); In re Potts, 6 Cir., (142 F (2d) 883); Waybright v. Columbian Mutual Life Insurance Co., 6 Cir., (122 F (2d) 245).

Defendant Patricia R. Smith's Petition For Rehearing

To render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties to the action and identity of quality in the persons or parties for whom or against whom the claim is made. Swift Coal and Timer Co. v. Cornett, (249 Ky. 760); Ralph Wolff & Sons v. New Zealand Insurance Co., (248 Ky. 304)."

"In the case of Prewitt v. Wilborn, (184 Ky. 639), the Court of Appeals clearly pointed out the distinction between the doctrine of res judicata and estoppel by judgment as follows:

> "A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties, upon the same cause of action, and a second suit between the same parties upon a different cause of action. In the first instance, the judgment is a complete bar to the second action, not only as to everything which was used in the first action to sustain or defeat the demand, but, everything, which the parties could have used properly for that purpose; but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estoppel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision and is not conclusive as to matters not decided, and the decision of which was not essential to the decision in the first suit, although issues may have been made in reference to them."

It is readily discernible from the examination of the Rescission Suit and this action, that there is lacking the identity of the quality of the parties necessary to bring the Rescission suit within the ambit of the doctrine of res judicata or estoppel by judgment. The principles of law laid down by the Kentucky courts applied to the causes of

action in issue leads the Court to the conclusion that the motion for summary judgment must be overruled.

s/ E. B. Freed

United States District Judge"

November 6, 1947

The law that was in effect and controlling on the issue of res judicata on November 7, 1947, and in effect when the joint administrators committed fraud in the sale of the interest of the estate of John A. O'Brien, deceased, in Edward J. O'Brien Tobacco Company for less than one-third (⅓) of the net sound market value, is the law that is controlling in this case, and the citation given to the joint administrators by this Court (Judge Kent) of *Davis v. McKinnon and Mooney,* 266 Fed. 2d 870, 873 (1959), does not apply to the instant case, and none of the other cases cited on pages 7 and 8 of the opinion have any application to the within case.

As will be noted from the opinion of Judge Freed of November 6, 1947, on the joint administrators motion for summary judgment, Judge E. B. Freed of Cleveland, Ohio, ruled that "whether the judgment in the case of *O'Brien vs. O'Brien,* (294 Ky. 793), the Rescission Suit is res judicata as to this action or constitutes an estoppel by judgment must be determined by the law of Kentucky". See the cases of *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.* (309 U.S. 4); *In re Potts,* 6 Cir., (142 F. (2d) 883); *Waybright v. Columbian Mutual Life Insurance Co.,* 6 Cir., (122 F. (2d) 245). Therefore, the case of *Davis vs. McKinnon & Mooney,* 266 Fed. (2d) 870, 873 (1959) which was cited in this Court's opinion *and was tried in the Common Pleas Court of Lake County, Ohio, has no application to a case in Kentucky,* in an action against joint administrators because they violated their trust and their bonds in the settlement of the estate of John A. O'Brien, deceased.

Further, Judge Freed held that "to render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties for which or against whom the claim is made, *Swift Coal and Timer Co. v. Cornett,* (249 Ky. 760); *Folph Wolff & Sons v. New Zealand Insurance Co.,* (248 Ky. 304)".

We have examined the other cases cited on pages 7 and 8 of this Court's opinion and not a single one of the cases apply to the instant case. This Court should apply the laws of Kentucky on the issue of res judicata as stated in the opinion of Judge E. B. Freed.

The adoption of the rule in the Davis vs. McKinnon & Mooney case by this court is not the rule in Kentucky and never has been. If it is the rule now in Ohio, it did not become so until May 28, 1959, and that is years later than when this cause of action arose in the state of Kentucky.

The adoption of this rule of law now (1961) in Kentucky which grew out of a decision in Ohio in 1959 (*Davis vs. McKinnon and Mooney*) certainly should not be used to govern the findings in a law suit where the cause of action arose ten years or more before the decision in the *Davis vs. McKinnon & Mooney* case and after the litigation was instituted regardless of the unfairness of the application in the instant case it is not the rule in Kentucky and the Kentucky law should control in this decision.

Governor Wilbur M. Brucker of Detroit, Michigan, former governor of Michigan, and former Secretary of the Army, represented the defendant, Mrs. O'Brien-Smith, from 1940 to 1944 in the "Rescission Suit" against the O'Brien brothers, and he stated to the joint administrators more than once that no relief was sought against them in the "Reformed and Amended Petition in the Rescission Suit,"

nor prayed for in the prayer of the Petition in the Rescission Suit, and that they were only named as nominal parties, defendant, so that Mrs. O'Brien-Smith could maintain "the Rescission Suit," in her own name.

It was not necessary for the joint administrators to employ attorneys in the "Rescission Suit" and to file strong briefs against the estate of John A. O'Brien and Mrs. O'Brien-Smith, and when the first opinion was rendered in the Rescission Suit by the Court of Appeals of Kentucky, it was a divided court. One Judge was home ill, but three of the judges were of the opinion *that Mrs. O'Brien-Smith was entitled to eighty-five thousand ($85,000.00) dollars or more because that was the net profit belonging to the estate of John A. O'Brien deceased, for the year of 1935 from Edward J. O'Brien & Company, which was not disclosed to the defendant Mrs. O'Brien-Smith before the partnership interest was sold.* The joint administrators and their attorneys should have joined with Governor Brucker in filing briefs on the petition for rehearing in the Rescission Suit and in the Oral Argument of Governor Brucker before the Court of Appeals of Kentucky on the Petition for rehearing; instead, the joint administrators and their attorneys joined with the O'Brien brothers and bitterly fought against the estate and bitterly opposed Mrs. O'Brien-Smith throughout the "Rescission Suit." Now why should this estate pay either the joint administrators or their attorneys in the "Rescission Suit." The above was all stated to this Court in the "Defendant's, Mrs. Smith, Response to Joint Administrators Printed Reply to Mrs. O'Brien-Smith's original counterclaim."

This Court should consider this question; "Should lawyers be paid for law suits filed and prosecuted in an estate, when they lost each and every suit in the Court of Appeals of Kentucky and even after the Court of Appeals of Ken-

tucky ruled against them, the joint administrators *defied the Rulings of the Court of Appeals of Kentucky; they defied the rulings of the Judge of the Jefferson County Court* and kept on filing suits and appeals in the Jefferson Circuit Court, and the Court of Appeals of Kentucky, lawyers who hold themselves out as being well versed on Kentucky law and administrators who claim they have the largest banks and trust companies in Kentucky. Thus, the estate of John A. O'Brien and Mrs. Smith should be reimbursed for the expense of those law suits and for the long years of tiresome and expensive litigation, which Mrs. Smith has had to pay for out of her own pocket all because the trust companies and their attorneys knew they had committed fraud in the sale of the interest of Mrs. O'Brien-Smith in the Edward J. O'Brien Tobacco Company, and they were hoping to wear down the resistance of Mrs. O'Brien-Smith and her lawyers and to force her to give up her legal rights and claims in the estate of John A. O'Brien, deceased.

THE THEORY THAT THIS COURT HAS NO PROBATE JURISDICTION TO CONSIDER THE "DEFENDANT'S AMENDED ANSWER AND AMENDED COUNTERCLAIM", IS GROUNDLESS.

The theory that this Court has no probate jurisdiction to consider the "defendant's amended answer and amended counterclaim" is groundless. In reply to the Court's statement and ruling on page three (3) of the Opinion that the joint administrators objection, to "Mrs. Smith's motion for leave to file an amended answer and amended counterclaim," in the within action should be sustained, is without any legal basis.

If this Court has no probate jurisdiction to consider the "Defendant's amended answer and amended counterclaim" (tendered herein on February 23, 1957), then this Court has no jurisdiction to consider the "Order and Judgment,"

of March 5, 1952 and amended on May 1, 1952, of the Judge of the Jefferson County Court in favor of the joint administrators and their attorneys on a matter for the joint administrators' which is definitely a probate matter, "Their purported Final Settlement of Accounts for the Estate of John A. O'Brien, deceased." How then can this Court determine the accuracy of the different lawyers' fees for their different law suits filed in probate matters in the final settlement of the said estate if the court does not go into all phases of the probate matters?

All of the fees in the sum of seventy-five thousand seven hundred fifty-six dollars and ninety-eight cents ($75,756.98) that the joint administrators are seeking to obtain in this law suit for the Joint Administrators, and all of the fees for their seven law firms, namely:

(1) Peter, Heyburn, Marshall & Wyatt; who filed the joint administrators' first settlement suit at then withdrew from the case;

(2) Gordon, Laurent, & Ogden; who first represented The Louisville Trust Company was paid a fee of two thousand ($2,000.00) dollars from the O'Brien estate over protest of Mrs. Smith and they withdrew;

(3) Davis, Boehl, Viser & Marcus;

(4) Allen, McElwain, Dinning & Clarke;

(5) Bruce & Bullitt;

(6) Bullitt, Middleton, Seelback & Milner, and

(7) Bullitt, Dawson & Tarrant.

The last five law firms have been awarded five different law fees for prosecuting trumped-up law suits in the estate of John A. O'Brien, deceased, since nineteen hundred and thirty-seven (1937), a period of twenty-four years, all of which grew out of purported settlements of the said estate, and were all in a probate matter. All of the law firms who were employed to delay for the joint administrators their filing of a final settlement of the estate of John A. O'Brien,

deceased, in the Jefferson County Court for twenty-seven (27) years, as we have clearly shown.

Now this Court has stated on page 3 of its opinion that "Reference to previous litigations will be made only when it is pertinent to the determination of the motions before the Court in this case,"—no reference was ever made.

Now this Court's opinion has set up on pages 2, 3 and 4 of its opinion all of the law suits that have been filed and prosecuted in the estate of John A. O'Brien, deceased, and has devoted three one-half pages, single spaced, to enumerating them as though that would be legal grounds for awarding the lawyers' fees to them. It must be remembered it was the joint administrators who filed and caused to be filed all of those law suits except two, and we here set up the law suits in detail.

Why should the estate of John A. O'Brien and Mrs. O'Brien-Smith pay for law suits filed by administrators over a period of twenty-eight years to keep from filing a final settlement of the accounts of the said estate and to cover up their acts of fraud in the sale of the partnership interest, and their other acts of fraud. The records show that the joint administrators were in contempt of Court in defying the Rulings of the Court of Appeals and of the Jefferson County Court both in refusing to file a final settlement of their accounts of the said estate.

THE LAW SUITS FILED AND CAUSED TO BE FILED BY THE JOINT ADMINISTRATORS AND PROSECUTED IN THE ESTATE OF JOHN A. O'BRIEN, DECEASED

---

1. The joint administrators first settlement suit of the estate of John A. O'Brien, deceased, filed in the Jefferson Circuit Court at Louisville, No. 250301, styled *The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company vs. Patricia R. O'Brien*, was started on February 18, 1937, and was not finally determined until

Defendant Patricia R. Smith's Petition For Rehearing

May 16, 1950, after the joint administrators had filed a second appeal to the Court of Appeals of Kentucky and two petitions for rehearing and lost the suit, which was won by Mrs. O'Brien-Smith on both the first and second appeals to the Court of Appeals of Kentucky.

2. Reported Decision—*Smith vs. Burnett, Judge,* 300 Ky. 249, S.W. 2d 480. Mrs. O'Brien-Smith's original action in the Court of Appeals of Kentucky for Writ of Prohibition against Judge Burnett to stop him from proceeding with the joint administrators' first settlement suit. Writ denied June 15, 1945. When Mrs. O'Brien-Smith won the first appeal, the petition for rehearing and the joint administrators' second appeal on the first settlement suit, it proved she was right in her contention in the Writ of Prohibition Suit, which she filed in order to keep the joint administrators from proceeding with the first settlement suit in Jefferson Circuit Court against the estate of John A. O'Brien, deceased, and to keep the estate from being burdened with the expense of a law suit.

Mrs. O'Brien-Smith's first appeal of the joint administrators' first settlement suit, *Smith vs. The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company* 308 Ky. 189; 213 S.W. 2d 987, June 8, 1948; rehearing denied to the joint administrators on October 29, 1948. This suit was won by Mrs. Smith in the Court of Appeals of Kentucky.

The joint administrators second appeal of their first settlement suit filed on April 6, 1949, *The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company vs. Smith,* 313 Ky. 15; 230 S.W. 2d 64, May 16, 1950. This was won by Mrs. Smith, in the Court of Appeals of Kentucky.

3. The joint administrators second settlement suit of the estate of John A. O'Brien, deceased, filed in the Jefferson Circuit Court No. 313655, styled *The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company vs. Patricia R. Smith,* was filed on March 31, 1949, and was not dismissed in the Jefferson Circuit Court until after the Court of Appeals of Kentucky granted to Mrs. Smith a permanent injunction enjoining the joint admin-

istrators from ever filing a second settlement suit of the estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, the reported decision on the permanent injunction granted to Mrs. Smith is *Smith vs. The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 237 S.W. 2d Ky. 836. Rehearing denied to the joint administrators. Mrs. O'Brien-Smith's suit to enjoin the joint administrators from prosecuting a second settlement suit against the estate of John A. O'Brien, deceased, was No. 313986, in the Jefferson Circuit Court, filed on April 21, 1949.

The joint administrators' purported final settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court, No. 24146 (filed June 21, 1950 - May 1, 1952). Judge Brady Stewart ruled that this could not be a final settlement of the estate of John A. O'Brien, deceased, *until the joint administrators' second settlement suit in the Jefferson Circuit Court was dismissed and until the joint administrators' appeal from an order of the "Rule Issued" against them in the Jefferson County Court to the Jefferson Circuit Court, which was not dismissed until July, 1954.*

4. On May 26, 1949 the joint administrators appeal to the Jefferson Circuit Court, No. 314,574 from the "Rule Issued" against them by the Judge of the Jefferson County Court ordering them to file a final settlement of the estate of John A. O'Brien by June 5, 1949, and the joint administrators had a supersedeas executed June 2, 1949, on Jefferson County Court Judge by serving on Hon. Horace A. Barker, judge of the Jefferson County Court, a copy of the supersedeas enjoining the judge of the Jefferson County Court from proceeding in the settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court, which the joint administrators appealed from the order of the Jefferson County Court, making the motion for "Rule," against them "absolute." The said appeal was not dismissed until July, 1954. That supersedeas was as binding on Judge Barker's successor as it was on Judge Barker, and his successor in office was Judge Boman L. Shamburger, and when he was proceeding to have hearings on the settlement of the accounts of the joint administra-

tors of the estate of John A. O'Brien, deceased, in July-December, 1951, and January and March, 1952, the appeal of the joint administrators was still in full force and effect, as well as the joint administrators supersedeas, and the joint administrators refused to dismiss the said appeal and Shamburger refused to order them to do so.

5. *Smith vs. Shamburger, Judge*, 314 Ky. 850; 238 S.W. 2d 844. Mrs. O'Brien-Smith's original action in the Court of Appeals of Kentucky to stay Judge Shamburger from proceeding in Jefferson County Court for the purported final settlement of the estate of John A. O'Brien, deceased, January 26, 1951; rehearing denied May 11, 1951. Mrs. O'Brien-Smith lost that suit, but was upheld in her contentions in the said suit by the "Ruling" of Judge Brady Stewart that there could not be a final settlement of the estate of John A. O'Brien, deceased, as long as the joint administrators second settlement suit was pending in the Court of Appeals of Kentucky and as long as the joint administrators' appeal to the Jefferson Circuit Court on the "Rule Issued" against them in the Jefferson County Court to settle the estate of John A. O'Brien, deceased, to file a final settlement of the estate of John A. O'Brien was pending in the Jefferson Circuit Court, and the said appeal of the joint administrators was not dismissed in the Jefferson Circuit Court until July, 1954.

THE ONLY SUITS FILED IN THE ESTATE OF JOHN A. O'BRIEN, DECEASED BY MRS. O'BRIEN-SMITH:

---

1. Mrs. O'Brien-Smith's Rescission Suit, to rescind the November 5-15, 1935, sale of Mr. O'Brien's partnership interest in E. J. O'Brien & Company, by the joint administrators. In Jefferson Circuit Court No. 250,536, *Patricia R. O'Brien vs. Edwin J. O'Brien, et al.* (March 10, 1937-May 8, 1944). This suit was against the O'Briens only, as held by Judge E. B. Freed of Cleveland, Ohio.

Reported decisions: *O'Brien v. O'Brien*, 294 Ky. 793, 172 S.W. 2d 595; S.C. cert. den. 321 U.S. 767 (January 31, 1944); rehearing denied 322 U.S. 769 (May 8, 1944). This suit was against the O'Brien brothers only and it was not

necessary for the joint administrators to even answer it or take any part against the estate and Mrs. O'Brien-Smith.

2. Mrs. O'Brien-Smith's suit for a permanent injunction against the joint administrators to enjoin them from prosecuting a second settlement suit in the estate of John A. O'Brien, deceased, was filed in Jefferson Circuit Court, No. 313,986, and won by her in the Court of Appeals of Kentucky, styled *Smith v. Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 237 S.W. 2d Ky. 836. Petition for rehearing was denied to the joint administrators.

3. Mrs. O'Brien-Smith's suit to force the joint administrators to sign all of the carbon copies that they supplied to restore all of the records of the estate of John A. O'Brien, deceased, that were lost, misplaced or stolen when removed by the joint administrators from the Jefferson County Court to the Jefferson Circuit Court on their appeal from the "Rule Issued" against them by the Judge of the Jefferson County Court to file a final settlement of the O'Brien Estate by June 2, 1949. *Smith v. The Louisville Trust Company, and Citizens Fidelity Bank & Trust Company*, 262 S.W. Ky. 479, November 20, 1953. Mrs. Smith won the suit and a final order was entered in the Jefferson Circuit Court in July, 1954.

4. Mrs. O'Brien-Smith's $322,035.04 Damage Suit against the joint administrators alleging fraud in the sale of Mr. O'Brien's partnership interest by the joint administrators—in Federal Court (Louisville), No. 870, *Patricia R. Smith v. Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, dismissed without prejudice by Mrs. Smith, March 10, 1949. See order of Judge E. B. Freed of March 10, 1949.

5. Reported decisions: *Commonwealth v. Shilladay*, 311 Ky. 478, 224 S.W. 2d 685—Indictments returned on April 17, 1948 of accountants (representatives of Arthur Young Company, accounting firm, who audited E. J. O'Brien & Co.'s books for use in the $822,035.04 Federal Court Damage Suit against the joint administrators. That suit was against the accountants only, and it was not necessary for the joint administrators to attend all the hearings and to

assist the accountants in winning the suit, unless they were the cause of them stealing the auditing work sheets and refusing to render an audit to Mrs. Smith for which they had been paid.

6. Mrs. O'Brien-Smith on October 1, 1951, filed petition for removal in Federal Court (Louisville), No. 2224, to remove to Federal Court the joint administrators' Jefferson County Court proceedings for final settlement of Mr. O'Brien estate; which petition for removal was denied.

When this Court was listing the law suits and appeals and petitions for rehearings on pages 2, 3 and 4 of his opinion that had been filed in the estate of John A. O'Brien, why did this Court fail to set out or state the fact *that the joint Administrators on May 26, 1949, filed an appeal in the Jefferson Circuit Court from the "Rule Issued" against them in the Jefferson County Court to file a final settlement of the estate of John A. O'Brien, deceased, in County Court by June 5, 1949.* Further, that the joint administrators had a supersedeas executed on Judge Horace A. Barker on June 2, 1949, staying all proceedings to file a final settlement in the Estate of John A. O'Brien. Further, that the joint administrators' appeal to the Jefferson Circuit Court was not dismissed until July, 1954, making the "Order and Judgment" of March 5, 1952, and May 1, 1952, of the Jefferson County Court void ab initio.

If the joint administrators and their seven law firms are awarded seventy-five thousand seven hundred fifty-six dollars and ninety-eight cents ($75,756.98) with six (6) per cent interest since May 1, 1952, they will get more out of the estate of John A. O'Brien, deceased, than the sole beneficiary of the estate and the will of John A. O'Brien, deceased.

Never before in the history of Kentucky Jurisprudence have such large fees been paid or trust companies and attorneys been permitted to consume over half of the entire estate by breach of their trust as personal representatives

and multiplicity of illegal and unwarranted law suits over a period of twenty-seven (27) years and to this day the joint administrators have not filed a final settlement of the estate of John A. O'Brien, deceased, according to the laws of Kentucky.

This Court has criticized the pleadings and briefs filed by counsel for the defendant, Mrs. Smith, in the within case. We wish to call this Court's attention to the fact that the Judges of the Court of Appeals of Kentucky, who are outstanding lawyers, thought enough of the pleadings and briefs of the counsel for the defendant, Mrs. Smith, to decide four cases and a number of petitions for rehearings in Mrs. Smith's favor and against the Citizens Fidelity Bank & Trust Company and the Louisville Trust Company as we have enumerated herein on pages 14, 15 and 16 of this petition for rehearing.

THE STATUTES OF LIMITATIONS OF KENTUCKY UPHOLD MRS. SMITH'S CONTENTIONS THAT SHE CAN SUE THE JOINT ADMINISTRATORS FOR FRAUD ON THEIR BONDS AS ALLEGED IN HER ANSWER AND ORIGINAL COUNTERCLAIM IN THIS CASE ON NOVEMBER 12, 1956.

This Court is in error in holding that Mrs. Smith cannot sue the joint administrators as principals or as sureties on their bonds, on page six (6) and seven (7) of its opinion, and on page four (4) and five (5) of the said opinion sets out the Statutes of Limitations of Kentucky.

The Statutes of Limitations of Kentucky uphold Mrs. Smith's contentions that she can sue the joint administrators for fraud on their bonds, as she alleged in her original counterclaim included in her original answer filed in this case on November 12, 1956.

Further, Mrs. O'Brien-Smith did not discover that the joint administrators were the ones who were guilty of fraud, misrepresentation, and failure to disclose to her the true market value of her interest in the Edward J. O'Brien Tobacco Company, and that the O'Brien brothers were not alone guilty of fraud until after the final decision in the case of *O'Brien v. O'Brien* in May, 1944, and she filed her original counterclaim herein on November 12, 1956, because in that case, the Court held in effect that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the value of her partnership interest because she had "competent and trustworthy counselors", meaning that the joint administrators should have ascertained the true market, net sound, value of her partnership interest in Edward J. O'Brien Tobacco Company, and both of the vice-presidents of the two trust companies, the joint administrators herein testified that they made no investigations whatsoever and took the word of Edwin J. O'Brien, Jr. as to what Mrs. Smith's partnership interest was worth.

This court contends that the defendant Mrs. O'Brien-Smith's original counterclaim relating to the sale of the decedent's partnership interest is barred by the Statutes of Limitations. This Court asserts that if Mrs. Smith has any cause of action upon her counterclaim it must be based upon the joint administrators' bonds. This Court states in his opinion that an action upon an administrator's bond is governed by KRS 413.090, and that the counterclaim of Mrs. Smith is barred by that statute, because Mrs. Smith did not commence an action thereon within 15 years after her cause of action "accrued".

To properly understand the legal effect of an administrator's bond, it is necessary to examine the statutory provisions pertaining not only to the bonds, but to the duties of the administrator for the performance of which the bond

is required. The requirements of a fiduciary bond, in Kentucky, are fixed by KRS 62.060, which provides that the bond of a fiduciary shall be a covenant from the principal and surety "that the principal will faithfully discharge his duties". Among the "duties" specified by statute to be performed by the personal representative are these "musts".

KRS 25.175 provides;

(1) He "must" one year after his appointment, and annually thereafter until otherwise provided by law "RENDER AN ACCOUNTING OF THE EXECUTION OF HIS TRUST TO THE COURT BY WHICH HE WAS APPOINTED."

(2) He "must" render an accounting at any other time upon the order of the court.

(3) "AT THE EXPIRATION OF HIS TRUST SUCH FIDUCIARY MUST FULLY ACCOUNT FOR AND PAY OVER THE TRUST ESTATE TO THE PERSON OR PERSONS ENTITLED THERETO," and

KRS 62.070 further provides:

"Recovery on the bond shall not be restricted to the duties or responsibilities belonging to the office, trust or employment at the date the bond is executed, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed."

The bond of the plaintiffs joint administrators covenanted that they would faithfully discharge all the above duties. It is of no consequence that the joint administrators are corporate fiduciaries, because a corporate fiduciary is expressly made subject to all the duties and responsibilities as individual fiduciaries except, upon the bond of a corporate fiduciary, the only security, unless otherwise required, shall be "the capital stock." *KRS 287.220.* Here, the bond of the plaintiffs Joint administrators contains no surety other than "the capital stock" of the two trust

companies, whatever that may mean. No "capital stock" was deposited as security, and no necessity arises for construing the meaning or effect of the statute providing that upon the bond of a corporate fiduciary the only surety required is the capital stock. It is sufficient here to consider that the bonds are executed by plaintiff trust companies as principals, and they are proceeded against here as principals. No complications or sureties are involved, and the liability asserted against the plaintiffs joint administrators on the counterclaim is their liability on the bond as principals. Under *KRS 62.070* recovery against the surety is limited to the penalty fixed in the bond, "but recovery against the principal shall not be limited by the penalty fixed in the bond."

The statute therefore places upon the personal representative the duty to make annual court settlements of his accounts, and to pay over the trust estate to the persons entitled thereto "at the expiration of his trust", and the official bond of the personal representative covenants that he will faithfully do so. Manifestly, if the personal representative fails to account for and turn over the property to the persons entitled thereto "at the expiration of his trust" he commits a breach of his bond. *Since he engages by his bond to turn over the estate "at the expiration of his trust" the cause of action on his bond accrues "at the expiration of his trust".* The question immediately posed is, "has there been an expiration of plaintiffs' joint administrators' trust?" If so, when did their duties as personal representative cease and determine? The answers to the questions are found in an exhaustive annotation in 44 ALR (2d) p. 808, wherein it is stated that, by the weight of authority, the statute of limitations begins to run against the action on a bond of a personal representative from the *date on which occurs a final judicial ascertainment of the liability of the*

personal representative. In 44 ALR (2d) pp. 808, 809, it is stated:

> "By the weight of authority the statute of limitations ordinarily begins to run against an action on the bond of a personal representative from the date on which occurs a final judicial ascertainment of the liability of the representative." . . .
>
> "Probate practice varies widely, of course, from jurisdiction to jurisdication. Usually the administration of a decedent's estate involves orders settling the intermediate or final accounts of the personal represenative, orders directing the manner of distribution of the assets, of the estate, and, at least sometimes, orders for the formal closing of the estate. Exhibiting a wide range of variations as to details, a number of cases support the proposition that limitations against an action on the bond of an executor or administrator—at least in the absence of specific circumstances requiring a different conclusion—commence to run at the time of the final judicial ascertainment of the liability of the personal representative to heirs, distributees, or creditors. This may mean the date of the only decree of distribution entered in the particular estate; it may mean the date of the last of a series of decrees or order for distribution; it may mean the date of the order approving the final account of the representative; it may mean the date of a decree surcharging the representative and then settling his accounts as corrected.
>
> "As noted before, variation as to details is great. But the following cases may be cited as supporting the broad conclusion that what is to be properly regarded as the final judicial ascertainment of the principal's liability marks the time limitations commence to run against an action on the official bond."

This question was posed in *Mercer vs. Glass' Exr.*, 15 KLR 710-713, 25 S.W. 114, and the court there held that the executorial duties ended, and the statute of limitations began to run from the time the settlement was filed, saying:

> "It seems to us therefore—First that the disposition of the estate in pursuance of the settlement made in

1867, of which the apportionment of the land is to be regarded as a part, WAS AN END OF THE EXECUTORIAL DUTIES OF THE SONS . . .

"Applying this principle here, we see no reason why the lapse of time does not bar the appellants cause of action. IT AROSE WHEN THE SETTLEMENT AND THE DIVISION UNDER IT WERE MADE, AND FROM THAT TIME THE STATUTE BEGAN TO RUN—the limitation of 15 years applying to the principay obligors, and 5 years to the sureties."

Likewise in *Hargis vs. Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, The court made the observation that the administrator's duties were not terminated until final settlement of his accounts saying:

"It seems to us therefore—First that the disposition of the estate in pursuance of the settlement made in 1867, of which the apportionment of the land is to be regarded as a part, WAS AN END OF THE EXECUTORIAL DUTIES OF THE SONS . . .

"Applying this principle here, we see no reason why the lapse of time does not bar the appellants cause of action. IT AROSE WHEN THE SETTLEMENT AND THE DIVISION UNDER IT WERE MADE, AND FROM THAT TIME THE STATUTE BEGAN TO RUN—The limitation of 15 years applying to the principal obligors, and 5 years to the sureties."

Likewise in *Hargis vs. Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, The court made the observation that the administrator's duties were not terminated until final settlement of his accounting saying:

"This rule could not have been applied to an administrator regardless of the present statute as he was never considered as such a trustee, AFTER THE SETTLEMENT OF HIS ACCOUNTS AND THE DISTRIBUTABLE SHARE OF THE HEIR ASCERTAINED."

The statute here involved, KRS 413.090(3), applies to actions upon the bonds of receivers, as well as personal representative. In the case of *U. S. Fideltity & Guaranty Co. vs. Shields*, 157 Ky. 371, 163 S. W. 203, the court held

that the statute of limitations against an action upon the bond of a receiver did not commence to run until the receiver had made a settlement of his accounts, or had made a report to the court. The court there said:

> "The plea of the statute of limitations is unavailing. The plaintiff had no cause of action against the receiver, while he held the fund subject to the order of the court. He had never settled his accounts or made a report to the court, and until the court determined to whom the money was to be paid, no action could be brought. The seven year statute bars an action against the surety after seven years from the time the cause of action accrued. But the statute does not begin to run until the cause of action accrues. Here the cause of action did not accrue until shortly before this action was brought. The cause of action against the surety accrues at the same time as it does against the principal."

Likewise in the case of *Tucker vs. Aetna Casualty & Surety Co.*, 270 Ky. 723, 110 S. W. (2d) 649, the court held that the right of an heir to sue for his distributable share of the estate of a decedent accrues upon the settlement of the estate. Referring to the case of *Hargis vs. Sewell's Admr., supra,* the court said:

> ". . . It also was held that when the distributable portion of the estate had been ascertained by the settlement, any heir had the right to sue for his distributable share, and the statute of limitation would run from the accrual of the cause of action to the same effect, See *Schwerman vs. Commonwealth*, 99 Ky. 296, 38 S.W. 146, 18 Ky. Law Rep. 585; *Grant County Building & Loan & Savings Association v. Lemmon*, 78 S. W. 874, 25 Ky. Law Rep. 1725; *Commonwealth v. Sammons*, 180 Ky. 403, 202 S.W. 885; *United States Fidelity & Guaranty Company v. Shields*, 157 Ky. 371, 163 S.W. 203."

The reasons for adopting the date of accounting and settlement for the commencement of the statute of limitations are obvious, and sound. No one can know the amount of his or her distributable share in decedent's estate until

the personal representative has made an accounting and a final settlement of an estate. And the finality of such accounting and final settlement, may have to await the final judgment of the court in the suit to surcharge the settlement for negligence or mismanagement. The joint administrators do not claim, and cannot claim that they made any final court settlement of their accounts in the estate of John A. O'Brien, deceased, until March 5, 1952. And, although their settlement is in the amended answer and amended counterclaim tendered hereby by Mrs. Smith, on the grounds of negligence and misconduct in the handling of the estate and a breach of trust, *the 15 year period from the date of the final settlement will not expire until 1967, and is not barred.* The sale of decedent's partnership interest by the joint administrators comprises an item that must be taken into consideration on a final settlement and accounting of the plaintiffs' joint administrators. *As long as the joint administrators assume and continue to act as such administrators, and have cash in their hands belonging to the estate, so long the counterclaim may be asserted, and it is not barred.*

Another aspect of the law in relation to the plea of limitations should be considered by the court on the joint administrators motion for summary judgment. The counterclaim for loss on the sale of decedent's partnership interest cannot be barred by limitations as a defense against the claims asserted by the joint administrators. The counterclaim relating to the sale of the partnership interest arises out of the same occurrence or transaction sued on by plaintiffs Joint Administrators, namely the administration by the joint administrators of the estate of the decedent. In such cases, the counterclaim is also a defense, and as long as this court will hear the joint administrators case, time will not bar the answer of the defendant, Mrs. Smith. A case in point is *Altman & Taylor vs. Meade,* 121 Ky. 241,

89 S.W. 137. There, the appellant sold a saw mill for $1900.00 and took a note and mortgage for the deferred payment of the purchase price in the sum of $1595.00 on the saw mill and certain real estate. Appellant procured a pre-confessed judgment, and a sale of the saw mill thereunder by the master commissioner for $700.00. More than five years thereafter, appellant sued for the balance owing on the note and to enforce the lien on the real estate. A "counterclaim" was filed by appellee alleging that the appellants had converted the saw mill under the void judgment. To this counterclaim the appellants pleaded the five year statute of limitations as a bar, and also estoppel alleging that appellee stood by and watched the saw mill sell, without objection, and even helped the purchaser to move it away. Holding that the statute of Limitations was inapplicable, and that the "counterclaim" constituted a good defense, this court said:

> "while appellees' claim against appellant might be properly a counterclaim in this suit upon the notes (section 96, Civ. Code Prac.), as it may be said to be connected with and grows out of the transaction or cause of action sued upon, it is also more than a counterclaim."

And in denying the plea of limitations, the court said:

> ".... For, admitting that the statute applies strictly to matters of set-off and counterclaim (Williams v. Gilchrist, 3 Bibb, 49; Gilchrist v. Williams, 3 A.K. Marsh, 235), still, as is well known, it does not affect the merits of the controversy. It only closes the doors of the court to the bringing of suits on such stale claims. It applies, alone, to the plaintiff's cause of action, and not at all to the defense; for, obviously, so long as the courts will hear the plaintiff's case, time cannot bar the defendant's answer. Edwards v. Kinsey's Admr. 14 Ky. Law Rep. 925; Grover's Exr. v. Tingle, 53 S.W. 281, 21 Ky. Law Rep. 885."

The principle that the statute of limitations has no application to a counterclaim arising out of the same occurrence

or transaction sued on is further announced in the case of *Lewis v. Kash*, 239, Ky. 38 S.W. (2d) 978(where the court said and held:

> "As pointed out in the case of Luscher et al v. Security Trust Co. et al, 178 Ky. 593, 199 S.W. 613, L.R.A. 1918C, 615, the cases of Aultman & Taylor Co. v. Meade, 121 Ky. 241, 89 S.W. 137, 28 Ky. Law Rep. 208, 123 Am. St. Rep. 193; Weakley v. Meriweather, 156 Ky. 304, 160 S.W. 1054, and cases cited therein announced the rule that the plea of limitations will not prevail against the right of the defendant to assert by way of counterclaim transactions connected with and growing out of the matter that was the basis of the suit."

The foregoing rule is recognized in Federal procedure, and is stated in *Moore*, Vol. 3 p. 25, as follows:

> "*13.11 Statute of Limitations.*
>
> As pointed out in Sec. 13.02, supra, there is no difference for purposes of pleading between so-called 'set-off', 'recoupment', and 'independent claims'; all constitute counterclaims. This in no way affects the substantive problem as to whether the statute of limitations has run against the claim pleaded as a counterclaim. Thus, recoupment, which is necessarly based on matter arising out of the transaction sued on, when used only to defeat the plaintiff's claim, is never barred by the statute of limitations so long as the main action itself is timely."

THE DEFENDANT, MRS. SMITH, COULD NOT LEGALLY APPEAL FROM THE ORDER AND JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952 AND MAY 1, 1952, TO THE JEFFERSON CIRCUIT COURT FOR THREE REASONS:

This Court is in error in holding that Mrs. Smith should have filed an appeal from the "Order and Judgment" of the Judge of the Jefferson County Court of March 5, 1952, and amended May 1, 1952, and that the joint administrators and their attorneys are now entitled to a final judg-

ment for the fees awarded them on May 1, 1952, without a trial of the case and ruling that Mrs. Smith cannot now be permitted to challange this settlement in this action on page 17 of his opinion.

The defendant, Mrs. Smith, could not legally appeal from the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and amended on May 1, 1952, to the Jefferson Circuit Court, because on May 26, 1949, the joint administrators filed an appeal from the "Rule Issued" against them by Judge Horace A. Barker, Judge of the Jefferson County Court, to the Jefferson Circuit Court, No. 314,574. That appeal was not dismissed until July, 1954.

The said "Rule Issued" against the joint administrators ordered them to file a final settlement of the estate of John A. O'Brien, deceased, before May 5, 1949. (On motion of the administrators, the time for filing was extended to July 5, 1949, and on motion of Mrs. Smith, the time was reduced to June 5, 1949.) The "Said Rule" was issued in compliance with the opinion and mandate of the Court of Appeals of Kentucky in the first settlement suit of the joint administrators (See *Smith v. Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 308 Ky. 109; 213 S.W. 2d 989, June 8, 1948; rehearing was denied to the joint administrators on October 29, 1948.) On April 6, 1949, the joint administrators filed a second appeal in the Court of Appeals on their first settlement suit (See defendant's Exhibit "32", pages 31 through 42 of typewritten copy and pages 719a-734a of printed Tr. of Record, which is a photostatic copy of the transcript of records from the Jefferson County Court in the O'Brien Estate.)

When the joint administrators filed their appeal to the Jefferson Circuit Court, No. 314, 574, from the "Rule Issued" against them, they had a supersedeas served on Judge Horace A. Barker, Judge of the Jefferson County

Court on June 2, 1949, in their Jefferson Circuit Court Appeal No. 314574, thus staying all proceedings in the settlement of the estate of John A. O'Brien in the Jefferson County Court. The joint administrators said appeal and supersedeas were not dismissed in that action until July, 1954. See the defendant's Exhibit "G", filed with "Defendant's Motion for Leave to File an Amended Answer and Amended Counterclaim" and filed with the "Tendered Amended Answer and Amended Counterclaim" in this case on February 23, 1957. See Defendant's Exhbit No. 32 from page 713a to 752a, also pages 870-932a in Transcript of Records of the estate of John A. O'Brien from Jefferson County Court. Also see the Defendant's Exhibit No. 33, which is Volume 2 of Transcript of Records from Jefferson County Court, page 942a-943, filed in this Court on August 28, 1959.

This Court has disregarded the fact that when the joint administrators filed their appeal to the Jefferson Circuit Court, they took all of the original records in the estate of John A. O'Brien, deceased, from the office of the Clerk of the Jefferson County Court to the office of the Clerk of the Jefferson Circuit Court. After that, all of the records of the said estate were lost, misplaced, or stolen. The said records were not legally restored until July, 1954, (two years after the order and judgment of the judge of the Jefferson County Court was filed and entered on March 5, 1952, and May 1, 1952), by an order entered in compliance with the opinion and mandate from the Court of Appeals of Kentucky in favor of Mrs. Smith, (See the case of *Smith v. The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 262 S.W. 2d Ky. 479, November 20, 1953.

While the joint administrators second appeal on their first settlement suit was pending in the Court of Appeals of Kentucky, while their appeal to the Jefferson Circuit Court from the "Rule Issued" against them in the Jefferson County Court was pending, the joint administrators on May 19, 1949, filed a second settlement suit of the said estate in the Jefferson Circuit Court, No. 313,655, on March 31, 1949, and a copy of it was filed in Jefferson County Court on May 19, 1949. All of the above steps of the joint administra-

tors' appeals and suits were in defiance of the "Rulings" from the Court of Appeals of Kentucky and the "Rulings" of the Judge of the Jefferson County Court and yet the joint administrators have the audacity to tell this Court that Mrs. Smith and her counsel delayed them in filing a final settlement of the estate of John A. O'Brien, deceased, for twenty-eight (28) years, and until this day they have not filed a final settlement of the O'Brien Estate in the Jefferson County Court.

This Court has disregarded all of the above facts which were briefed in this case and when the joint administrators and their attorneys spent ten (10) or more days in the Jefferson County Court before a Special Commissioner in July, 1951, in December, 1951, and January and February, 1952, introducing records and testimony and obtained the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and of May 1, 1952, there were no records in the estate of John A. O'Brien, deceased, to prove or disprove anything which the joint administrators were contending—*the above reasons set forth are why Mrs. Smith did not file any objections to any item in the joint administrators' so-called final settlements of accounts, because it was not and is not a final settlement of the accounts of the estate, even to this day.*

Mrs. Smith has proven that the only objections that the defendant, Mrs. Smith, filed in the proceedings in the Jefferson County Court and the only appearance made for her during that time *were the objections to the county court judge proceeding with the hearings in the estate in July, 1951, December, 1951, and January and February 1952,* for the above reasons and to save this estate further expenses when all of the records in the estate of John A. O'Brien from January 1, 1934, through June 2, 1949, were still missing. When the joint administrators gave bond and had the clerk of the Jefferson Circuit Court to issue a supersedeas on Judge Horace A. Barker, the then presiding judge of the Jefferson County Court, *the supersedeas was issued at the request of the joint administrators and their attorneys and their names are endorsed thereon by their attor-*

neys, R. Lee Blackwell and Irvin Marcus, (See Defendant's Exhibit "G", filed in this Court on August 28, 1959).

THE COURT OF APPEALS OPINION UPHELD MRS. SMITH'S CONTENTIONS THAT NO FINAL SETTLEMENT OF THE ACCOUNTS OF THE ESTATE HAD BEEN FILED WHEN THE ORDER AND JUDGMENT WAS ENTERED ON MARCH 5, 1952, AND AMENDED MAY 1, 1952.

This Court has disregarded the fact that counsel for the defendant, Mrs. Smith, objected to the Judge of the Jefferson County Court, Boman L. Shamburger, proceeding with hearings for the joint administrators for the above reasons set forth and filed the injunction suit against him for the same reason, and Mrs. Smith was upheld in her contentions by Judge Brady Stewart in his opinion from the Court of Appeals. Although the Court of Appeals refused to enjoin Judge Shamburger from proceeding, they, in effect, held that the settlement of accounts of the estate of John A. O'Brien, deceased, which the joint administrators were trying to have approved *could not be and was not a final settlement of the accounts of the estate of John A. O'Brien, deceased, because*—(1) The joint administrators second settlement suit of the estate of John A. O'Brien, deceased, was still pending in the Court of Appeals of Kentucky, which was filed April 21, 1949, in the Jefferson Circuit Court and (2) That the joint administrators' appeal from the Jefferson County Court "Rule Issued" against them filed May 26, 1949, was still pending in the Jefferson Circuit Court and we quote from the said opinion:

Smith vs. Shamburger, 283 S.W. 2d 844 (Ky.) 848.

"(7) In petitioner's argument in her (Mrs. Smith) briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court: (1) A settlement suit, filed April 21,

1949, and (2) an appeal from the county Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former Judge of Jefferson County Court, directing the Co-administrators to settle the estate. *There has been no final disposition of either of these cases.* It would seem, however, that the filing of the accounting of the Co-administrators in the County Court bestows upon the latter complete jurisdiction to finally determine all issues now in dispute. *If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement."*

Thus the Court of Appeals, in effect, stated that there could not be a final settlement of the said estate in County Court until after the final decision in the joint administrators' second settlement suit in the Jefferson Circuit Court and until after the joint administrators' appeal in the Jefferson Circuit Court from the Rule Issued in the Jefferson County Court was dismissed, and this was not done until July, 1954.

Even though the Court of Appeals of Kentucky stated in the opinion (supra) that Mrs. Smith could obtain adequate relief from the rulings of the Judge of the Jefferson County Court by an appeal to the Circuit Court, that did not make it mandatory for Mrs. Smith to appeal to the Jefferson Circuit Court from the Order and Judgment of May 1, 1952, of the Jefferson County Court when the Court of Appeals had already held that it was not a final settlement of accounts of the said estate, and that was not Mrs. Smith's only remedy at law. Mrs. Smith had the right to choose between two remedies at law, which, under the laws of Kentucky, are (1) by appeal, or (2) to surcharge and falsify the final settlement of the accounts of the estate by administrators within five years after the final settlement is approved by a judge of the county court. This Mrs.

Smith did so. She filed a suit to surcharge the final settlement of the accounts of the Joint Administrators in the estate of John A. O'Brien, deceased, in the Jefferson Circuit Court at Louisville on February 28, 1957, and she tendered her "Amended Answer and Amended Counterclaim" in this court February 23, 1957. See the cases of:

Turley's Administrator vs. Barnes, etc., 103 Ky. 127; 44 S.W. 446, 20 K.L.R. 1808;

Scott's Heirs vs. Kennedy's Executor, 12 B.M. 516;

Stanbury's Admr. vs. Robinson, 16 Ky. Law. Rep. 310; all of which was cited on pages 11 and 12 of the defendant's Patricia R. Smith, brief, in support of "Defendant's Motion to File her Amended Answer and Amended Counterclaim," filed in this court on March 18, 1957, a copy of which was mailed to this Court at Grand Rapids, Michigan, in September, 1959.

At top of page 11 of the opinion, this Court admits that there are two ways to attack the final settlement of accounts of an administrator in county court:—

(1) By an appeal;

(2) To surcharge the final settlements of accounts of an estate by an administrator witihn five years after the final settlement, if no exceptions are filed.

This Court is in error when it states that the defendant, Mrs. Smith, participated in the proceedings leading to approval of the final settlement of accounts in county court—there is nothing in this record to support such conclusions.

The records in this case prove that Mrs. Smith *did not file any exceptions to any item in the so-called final settlement of accounts.* Mrs. Smith did not appear in the county court at any of the hearings in July, 1951, December 1951, January, 1952, or March 1952, even though the joint administrators had a subpoena served on Mrs. Smith in an attempt to force her to appear in county court to partici-

pate in the proceeding and hearings. Mrs. Smith did not go and could not go for she had broken her right ankle in three places. She could not wear a cast on her ankle and was forced to remain in bed for approximately three months.

The records in this case prove that no exceptions were filed by Mrs. Smith to the county court's settlement of accounts and they were confirmed without exceptions. In the case of *Andrews, et al, v. McCarty, et al,* 208 Ky. 25; 270 S.W. 466. It held that:

> "(2) On the other hand it has been held by this court in a long line of cases that the order of the county court confirming such a settlement without exceptions is not a judicial decision, but, as the ward is not before the court, partakes rather of the character of a ministerial act. The confirmation is not conclusive upon the parties and the court itself may order another settlement in which errors in the first may be corrected. Such settlements are only prima facie evidence subject to surcharge, and they operate rather as a means of preserving evidence. Scott v. Kennedy, 12 B. Mon. 510; Bell v. Henshaw, 91 Ky. 430, 15 S.W. 3, 12 Ky. Law Rep. 674; Turley v. Barnes, 103 Ky. 127, 44 S.W. 446, 19 Ky. Law Rep 1808; Caplinger v. Pritchard, 136 Ky. 349, 124 S.W. 352. In the case last cited the court said this:"
>
> " 'An action may be instituted in equity in the circuit court surcharging his settlements, and force him to account for what he owes the estate. • • •
>
> 'The rule is well established that when a settlement of a fiduciary is contested in the county court, and that court tries the exceptions on their merits, the remedy of the aggrieved party is by appeal, *but not so when there is no trial*, and his exceptions are dismissed without a hearing, as in the case at bar.'
>
> "(3) The county court settlement, confirmed without exceptions, not being void and being subject to surcharge when the answer was filed pleading this settlement, the plaintiff regularly should have amended his

petition and alleged the errors in it. If he had done this the action might have proceeded regularly as an action in equity to surcharge that settlement. While this was not done in form, everything that would have been accomplished by such an amendment to the petition was done by the exceptions filed to the settlement in the circuit court. The exceptions set up every fact that should have been set up in an amended petition to surcharge the county court settlement. Proof was taken on these exceptions and the case was heard on the merits. While the proceeding was irregular no substantial rights of the defendants was prejudiced. Section 134 of the Civil Code of Practice provides:

> " 'The court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.' "

The above case clearly proves Mrs. Smith's contentions that if no exceptions are filed in county court, the confirmation of the settlement of accounts is not conclusive upon the parties. Therefore, the "Order and Judgment" of the county court of March 5 and May 1, 1952, is not binding on anyone.

THIS COURT IS IN ERROR WHEN IT HOLDS THAT THE UNITED STATES DISTRICT COURTS HAVE NO JURISDICTION OVER PROBATE MATTERS.

This Court is in error when it holds that the United States District Courts have no jurisdiction over probate matters.

In the case of First National Bank & Trust Company, Guardian for Marie Therese Corby, Plaintiff, vs. Madeline Corby Morgan Webber, etc., Defendants, filed in the District Court of the United States for the Eastern District of Kentucky at Covington, February 7, 1934:

Defendant Patricia R. Smith's Petition For Rehearing

In a motion to remand the above styled case, counsel, for the plaintiff moved to remand this case to the Kenton Circuit Court because of lack of jurisdiction in the Federal Court. The argument was in substance as follows:

"We have no probate courts in Kentucky. We have County Courts which have probate jurisdiction and the probate jurisdiction which they have is of a very limited character. They have power to probate wills, to appoint and remove personal representatives and guardians and to state their accounts which is called a settlement thereof. This is all the power they have. They do not have possession of the estates or jurisdiction of the res. They do not have power to make orders as to the handling by personal representatives or guardians of the estate in their hands or as to their dispostion or distribution. The personal representatives and guardians handle, dispose of and distribute the estate in their hands as the law requires them to do, and after they have so done they go before the county judge and state or settle their accounts and his action may be carried by exceptions to the county court and circuit court and Court of Appeals.

"By express provision of the Civil Code of Practice of Kentucky the circuit courts of the state are given jurisdiction of suits against personal representatives and guardians for the jurisdiction of the Courts of this State."

There were other arguments involved, but on March 30, 1934, Judge A. M. J. Cochran, judge for the Eastern District of Kentucky, gave the following opinion in over-ruling the motion to remand:

"There is no conceivable reason, requisite diversity of citizenship existing and amount in controversy being sufficient, why such a suit cannot be brought originally in this court or if brought in the state circuit court why it may not be removed to this court. If there is an action or suit which can be brought in the state circuit court, of which this court does not have jurisdiction,

original or on removal, if diversity of citizenship exists and the amount in controversy is sufficient it does not occur to me. I do not find it necessary to go into the authorities on the question. The lack of any authority exactly in point is due to the fact that in many, if not most of the jurisdictions of this country, there are probate courts with the powers and jurisdiction heretofore stated. Decisions that federal jurisdiction does not exist of probate matters and to the effect that in such jurisdictions the federal courts have jurisdiction to determine the rights of the parties, but no more, are indirect authorities in support of the position here taken. Those decisions are based on the ground that the probate courts have jurisdiction of the res. As we have no probate courts and as such probate jurisdiction as county courts have is of the limited character above pointed out, it necessarily follows that the federal courts in this state have full jurisdiction of the settlement of the accounts of personal representatives and the disposition and distribution of the estates in their hands. In exercising such jurisdiction, they do not invade the exclusive jurisdiction of any state court. The motion to remand is overruled."

In the case of *Griffith v. Bank of New York*, 147 Fed. 2d 899, February 16, 1945, which is applicable to the instant case, holds:

"1. Courts—262(1)

The federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court's judgment obtained by fraud.

"2. Courts—262(1)

An action could be maintained in federal court by residuary legatee against testamentary trustee for damages for breach of duty as trustee and duress in forcing legatee to consent to judgment of New York court settling trustee's account, if elements of federal jurisdiction appeared, although action was a collateral attack on the New York Supreme Court's judgment, where consent to the judgment was alleged to have been procured by

trustee's threat to tie up the property indefinitely unless settlement was made.

"3. Courts—198

Under New York Surrogate's Court Act, a Surrogate's Court has jurisdiction to vacate and set aside release obtained by fraud, and the fact that a judgment is involved raises no obstacle to exercise of jurisdiction, Surrogate's Court N. Y. 40.

"6. Judgment—713(2)

A judgment other than on the merits is conclusive only as to point expressly decided, and it is not res-judicata on points which might have been included, but were not adjudicated.

"7. Judgment—828(3)

An action in federal court by residuary legatee against testamentary trustee for damages as result of breach of duty and duress in forcing legatee to consent to judgment of a New York Supreme Court settling trustee's account was not barred by judgment of a New York Surrogate's Court dismissing petition seeking resettlement of trustee's account, where surrogate dismissed petition for reasons not going to the merits.

"11. Courts—262(1)
Judgment—441

Where residuary legatee alleged that testamentary trustee had breached its duty as trustee and had used duress in forcing legatee to consent to a judgment of New York Supreme Court settling its account as trustee legatee's remedy was equitable and could be brought in either state or federal courts.

"14. Courts—260

Generally federal courts in diversity of citizenship cases should decide questions even involving state law unless some exceptional circumstances of a stereotyped nature intervene."

The above cited case definitely holds that district courts of the United States do have jurisdiction over cases like the instant case, as we have set out above, and states:

"Though the settlement thus envisaged has been fully consummated, plaintiff now alleges that her consent was obtained by duress, and that she has been damaged by the duress practiced upon her. Acts constituting the duress are alleged to be defendant's willful withholding of principal and income of the estate, initiation of unnecessary and expensive litigation exhausting this plaintiff and her co-beneficiary financially (referring to the action for construction of the will which resulted in a decree sustaining the validity of the trust, Bank of New York v. Kaufman, Sup., 26 N.Y.S. 2d 474, affirmed 261 App. Div. 818, 25 N.Y.S. 2d 408, leave to appeal denied 261 App. Div. 898, 26 N.Y.S. 2d 316; 285 N.Y. 854, 33 N.E. 2d 566), and threatened additional unfair and oppressive expense of litigation and withholding of the estate, coupled with refusal of information as to the trustee's conduct of the trust, bringing plaintiff to "a point of discouragement and despair" and fear of loss of her estate, so that she was not in a position to contract freely or negotiate a fair settlement with defendant."

"For it is well settled that the federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court judgment obtained by fraud. Marshall v. Holmes, 141 U. S. 589, 12 S.Ct. 62, 35 L.Ed. 870. And though it was once thought necessary that such fraud be "extrinsic," so that it could not have been considered in the original action, United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93, the later cases no longer seem to adhere strictly to even this limitation. Marshall v. Holmes, supra; Publicker v. Shallcross, 3 Cir., 106 F.2d 949, 125 A.L.R. 386, certiorari denied 308 U.S. 624, 60 S.Ct. 379, 84 L.Ed. 521; cf. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245, 246, 64 S.Ct. 997."

"(2) But putting aside the unsettled question whether cases such as those of Holmes and Publicker definitely mark the elimination of the Throckmorton restriction, cf. Graver v. Faurot, 162 U.S. 435, 16 S.Ct. 799, 40 L.Ed. 1030, the District Court erred because the duress or fraud here involved was, as alleged, sufficient to have

warranted a chancellor in disregarding or setting aside the prior judgment. Since the consent to that judgment is alleged to have been procured by the trustee's threat to tie up the property indefinitely unless settlement was made, this case is substantially identical with Ingram v. Lewis, 10 Cir., 37 F.2d 259, 70 A.L.R. 702, certiorari denied 282 U.S. 842, 51 S.Ct. 22, 75 L.Ed. 747, where a judgment of dismissal of an action for an accounting was disregarded by the federal court, since such dismissal was based on a release obtained by the trustee on threat of withholding the property. See also Park v. Park, 5 Cir., 123 F.2d 370; Seay v. Hawkins, 8 Cir., 17 F. 2d 710; Jefferson v. Gypsy Oil Co., 8 Cir., 27 F. 2d 304; Horton v. Stegmyer, 8 Cir., 175 F. 756, 758, 20 Ann. Cas. 1134."

"Though the court in the Ingram case, supra, did not in so many words classify the case as one of "extrinsic" fraud, both the situation there presented and the one before us seem clearly to be so characterized if we are bound to hold the powers of a court of equity thus restricted. For the very duress by which the release or consent is obtained also prevents the coerced party from challenging before or at trial the statements or conduct of its adversary. Thus in the original action the issue of duress never is before the court. Indeed, the case differs little, if at all, from those where a witness is forcibly prevented from testifying, or an attorney is bribed to fight a losing battle or give his client false advice."

". . . . We think, therefore, that no sufficient ground for dismissal of this action has been shown. Of course, we do not pass upon the existence of actual duress or coercion; that cannot be decided upon the mere face of the complaint.

"Reversed and remanded."

The above cited Griffith case clearly indicates that the United States District Courts have jurisdiction and have assumed jurisdiction of probate matters similar to the instant case in similar jurisdictions throughout the United

States. The above cited case is definitely in point with the instant case.

The defendant, Mrs. Smith, should be permitted to file her "Amended Answer and Amended Counterclaim" tendered herein on February 23, 1957.

The records show that Mrs. Smith did not take part in any of the proceedings in the final settlement of accounts in county court. She did not appear or file any exceptions. She did not have any remedy by appeal.

We respectfully request this Court to withdraw the opinion filed and entered in the within case on March 4, 1961, and to enter an opinion over-ruling the "Plaintiffs' motion for Summary Judgment" as to the "defendant's original Counterclaim included in Defendant's original answer" filed herein on November 12, 1956, granting Mrs. Smith the right to file her "amended answer and amended counterclaim" herein, and declare the order and judgment of March 5 and May 1, 1952, of the Judge of the Jefferson County Court, void and of no effect, and that the settlement in the county court is only prima facie evidence subject to surcharge.

Respectfully submitted.

s/ Walter B. Smith

WALTER B. SMITH
Counsel for the Defendant,
Patricia R. Smith,
801 Columbia Building
Fourth and Main Streets
Louisville 2, Kentucky

April 3, 1961.

CERTIFICATE OF SERVICE

I certify that on April 3, 1961, I served the foregoing "PETITION FOR REHEARING ON THIS COURT'S OPINION (JUDGE W. WALLACE KENT) RENDERED AND FILED IN THE ABOVE STYLED CASE ON MARCH 4, 1961," upon the Plaintiff, The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company, by that day mailing a copy thereof to their attorneys, Mr. Irvin Marcus, addressed to him at 1417 Kentucky Home Life Building, Louisville 2, Kentucky, and to Mr. Lee Blackwell, addressed to him at 1700 Kentucky Home Life Building, Louisville 2, Kentucky, postage prepaid, and deposited in the United States mail.

s/ Walter B. Smith

WALTER B. SMITH
Counsel for Patricia R. Smith.

ENTERED
APRIL 3, 1961
MARTIN R. GLENN, Clerk
By /s/ A. Rigsby
Deputy Clerk

A Copy: Attest
Martin R. Glenn, Clerk
By /s/ Loraine Miller
Deputy Clerk.